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THE LAW MAGAZINE.

ART. I.—ACCOUNTS AND THE LAW OF PARTNERSHIP.

A practical Treatise of Accounts, &c., with a Plan for the Amendment of the Law of Partnership. By Isaac Preston Cory, Fellow of Caius College, Cambridge, Barrister at Law.

THIS work is devoted to the discussion of partnership and accounts, and well deserves attention upon both of these subjects. The part which has principally interested us, is the explanation of the mercantile system of partnership. But we propose in the first instance to avail ourselves of Mr. Cory's labours by giving a short outline of a merchant's mode of keeping his accounts, and we hope that a few remarks upon this practical subject will not be unacceptable to our readers.

Merchants and tradesmen make it a matter of complaint, that, after they have incurred all the vexation and expense of a law-suit, they find their cause seriously injured by the want of sufficient knowledge amongst lawyers of the nature of mercantile accounts. Such expressions as "Cash Dr. to Sundries," "Wine Cr. to Cloth," "Profit and Loss Cr. to Cash," "To Bills Receivable," "To Bills Payable," and a hundred others of a similar description, are sometimes misunderstood by able advocates, who could discuss with the utmost acuteness all the mysteries of executory devises or equitable presumptions. A gentleman of the counter, who has spent his whole life in posting large sums under technical titles, well versed in the Waste Book and Journal and Ledger, makes very little allowance for ignorance upon this head; and the more enlightened merchant, who attributes the excellence of an accountant rather to familiar habit, than to any natural acuteness, knows that his counsel could explain his cause with far greater effect,

if he had a more correct acquaintance with the art of book-keeping. Thus even in Courts of Equity, where lawyers address men of their own style of education, this peculiar kind of knowledge is likely to attract confidence: while the advantage is still more sensibly felt in Courts of Common Law, where the persons, upon whom an impression is to be made, have a greater share of this knowledge than probably of any other. Being accountants themselves, they either think that a counsel also must be an accountant, and that, if he makes a mistake, he is endeavouring to mislead them; or else, with an equally unfair deduction, that he deserves no attention upon other parts of his case, because he is puzzled with accounts which are mere alphabet to them.[1]

Indeed an acquaintance with mercantile accounts is of great importance to all branches of the profession. To the attorney, that he may understand his client's case; to the counsel, that he may explain it to the judge or jury; and to the judge, whether he sits in a Court of Equity to decide for himself, or in a Court of Common Law to guide others to a correct decision. Mr. Cory in the work before us gives several examples of accounts and explains their character. We do not desire to follow him at length; but we will endeavour to explain the main principle upon which the system is founded, and then leave our readers to improve their knowledge with the assistance of the work itself.

"The system[2] of accounts commonly adopted by merchants and traders is of very great antiquity. It is called the *Italian* method, or *book-keeping by double entry*. Some fragments of antiquity serve to show that it was in use among the Greeks, from whom the Romans appear to have derived it. The remains of it then lingered in Italy till revived by the commercial cities of that country, whence it became generally adopted throughout Europe." According to this system the transactions of every day are entered in a book called the Waste Book. From thence they are transferred in a technical form into a book called the Journal, being the great chronicle of the affairs of the mercantile house. From the Journal these technical entries are copied into the Ledger, where they are arranged in

[1] We know a case in which a counsel of eminence requested that the sums might be stated in words, declaring himself unable to master accounts in figures.—*Edit.*

[2] Cory, p. 1.

the manner most methodical and most capable of easy reference. "It is not however exactly in this form that accounts are always or usually kept; for where transactions are large and complicated, it is impossible in the course of a day to enter in a single Waste Book all the transactions that occur, as several clerks must be employed to write at the same time. Again, if all accounts were kept fully and at large in the Ledger, a book of the greatest size would be filled in a week. This renders it imperative upon the merchant to adopt subdivisions of these books, and to introduce a variety of subsidiary books, without which no concern of any extent could be conducted. Again, in other lines of business, the dealings are so simple that the Journal and even the Waste Book may be dispensed with; and perhaps the whole machinery may be reduced simply to a Cash Book." This subdivision produces many different descriptions of account books, such as Cash-Books, Bill-Books, Day-Books, Books of Invoice, in short, all those peculiar records of business, which the transactions of different trades render necessary or convenient.

In all the different books, if kept upon the system of double entry, the items are inserted upon the following principle. Every article of which an account is kept, is treated in the books as an accounting party. If for instance the merchant deals in cloth, and makes a purchase of a certain quantity, the account headed "Cloth" is debited with that quantity; that is, the cloth account has received so many yards, for which it is responsible. In order to obtain the yards of cloth, money must have been paid or some article must have been given in barter. If money was paid, it was taken from the account of "Cash:" "Cash" account has contributed so much money to the merchant's transactions; and as "Cloth" was debited because a certain number of yards were carried to the cloth account, so now "Cash" must be credited, because it has yielded a certain sum of money. Thus there will be a double entry in the Ledger, under the account "Cloth," "Cloth Dr. to Cash," and under the account "Cash," "Cash Cr. to Cloth." If, instead of money being paid, an article was given in barter, for instance a certain quantity of wine, the account "Wine" will upon the same principle be credited and again there will be a double entry: "Cloth Dr. to Wine"

under the account "Cloth," and "Wine Cr. to Cloth," under the account "Wine." The account is framed as if there were a wine keeper, a cloth keeper, and a cash keeper; and as if these persons were respectively debited and credited with the several sums and quantities which they give or receive in the course of business.

In the Ledger of a general merchant there are as many accounts of this description as there are articles in which he deals. Still he requires an account of another description; for these accounts, although they explain his transactions in these several articles, contain no statement of the general result of his business. Besides he has other expenses and also other sources of income, in addition to those, which are connected with his own immediate trade. He may receive gifts or legacies, and he may pay servants, clerks and porters. With a view then to collect the statements of his loss and gain in his different transactions, and also of such of his receipts and expenses as arise less immediately out of his bargains, he opens an account which he calls the account of "Profit and Loss." On the credit side of this account he enters all his extraneous income, and also the gain realised in his business; on the debit side he enters his losses and also all the expenditure of income, outlay in his office, clerks' salaries, stationery, and any other payments of which he finds it convenient to make this account a memorandum.

For a more minute examination of this system of accounts, for the nature of the subdivisions which may be effected, for the mode of balancing and ascertaining the real condition of the merchant's estate, we refer our readers to Mr. Cory's work. We shall carry the subject only one step further, to the accounts of partners. But with that view we must begin by explaining the mercantile principle of partnership, upon which these accounts are framed. So far as we have at present gone, the accounts are kept in the same way, whether a single trader or one in company with others is engaged in the business. But in partnership transactions there is one additional account. In the case of a single trader the profit and loss account is his account as sole owner of the business; in a partnership, it is the foundation of the account, in which the shares of the different partners are ascertained.

"The mercantile[1] notion of a partnership is simply that it is a kind of corporation. The *firm* is always regarded as a kind of impersonification." "The accounts of the partnership are always the accounts of the *firm* itself and never of the partners." Thus the balance of the account of profit and loss, instead of going to a simple person, goes to the firm itself; from the firm it passes according to the terms of partnership to the partners, not however as members of the firm but as debtors or creditors to the firm, entitled on the one hand to meet its debts, on the other to enjoy its credit. "The Private Ledger[2] contains a *capital* account, which represents the firm, and this is made debtor to the partners for the capital and for the profits, and creditor for all the sums they have drawn out. It is followed by the private account of each partner, who is credited with his capital, and with the proportion of the profits ascertained in the general books, and debited with the sums he has drawn upon the firm: and the balance gives the sum due to him from the firm." The nature of the account is more fully explained in the following passage. "Partners[3] are never in account with each other, but always with the firm, and they are made creditors of the firm for all they bring in, and debtors to it for all they draw out. Each partner therefore has an account opened with the firm. If the partnership accounts are kept in the general books, then the stock must be made debtor to them for all they draw out; and they are dealt with precisely as any other debtors or creditors of the firm. They are creditors of the firm for the profits, which are divided in proper proportions, and carried to their respective credits; and they are debtors to it for all its losses, which they must make up."

Mr. Cory enumerates several incidents of partnerships in relation to their accounts. Two of them deserve particular attention; one, "that the firm,[4] *as a firm*, is always considered exactly solvent: the partners being as it were the guarantees of its solvency." Any deficiency that appears is credited to the firm, and debited to the partners: while on the other hand, if there is a surplus, it is debited to the firm, and credited to the partners. Another incident is "that all the property[5]

[1] Cory, 71. [2] Ib. 29. [3] Ib. 29. [4] Ib. p. 73. [5] Ib. p. 74.

brought into the firm, whether it be personalty or realty, cash, goods, or land, belongs in the mercantile view to the *firm* itself, and not to the partner who brings it in." The firm may be debited to the partner for any proportion of the value of the partnership-stock, according to the terms of agreement upon which the firm is constituted. But the right to the property and the authority to deal with it are vested in the firm itself, and the partners individually are no more entitled to it than any of the ordinary creditors.

Such being the mercantile principle of partnership, it may at first sight appear extraordinary that it should not have found its way into our law; the more so, as it was adopted in foreign countries with which we have so many ages been accustomed to carry on commerce. The cause is to be found in the peculiar circumstances of this country. During the reign of the princes of the Tudor family, monopolies were a fruitful source of revenue; and as the power of the crown was gradually receding before the advance of the commons, and it became dangerous to maintain the system of monopolies, the crown, having consented to their abolition, endeavoured to gain a similar profit by the erection of privileged trading companies.[1] The exercise of the dispensing power produced the same effect. "The legislative power of parliament," says Mr. Hume,[2] "was a mere fallacy; while the sovereign was universally acknowledged to possess a dispensing power, by which all the laws could be invalidated and rendered of no effect. The exercise of this power was also an indirect method practised for erecting monopolies. Where the statutes laid any branch of manufacture under restrictions, the sovereign, by exempting one person from the laws, gave him in effect the monopoly of that commodity."

So fertile were the crown and the crown lawyers in expedients for raising money. The exercise of the dispensing power does not appear to have been so favourable a plan as the erection of companies. By this latter course the same object was attained, because the company paid the crown for the advantages conferred upon them; while the public obloquy was smaller

[1] 21 James I. c. 3; Hume, Hist. Eng. v. 375, 397; Hallam, Const. Hist. i. 353, ii. 14.

[2] Hume, Hist. Eng. v. 401.

in proportion as the company was more numerous. The general result of this system was, that the existence of a corporation became identified with the enjoyment of exclusive privileges of trade. It does not seem to have occurred to our ancient lawyers or merchants, that the corporate character might be conferred upon a partnership without the annexation of any exclusive privilege: and thus the rules of common law were allowed to prevail over the mercantile community, rather through fear of an exclusive principle by no means inherent in trading corporations, than from any objection to those qualities which nevertheless belong necessarily to them.

We rejoice to think that the time has gone by, when the Sovereign could obtain money from the Subject by any side-wind manœuvres of this description. There is now no reason why the beneficial portions of corporate privileges should not be granted to traders, without the addition of those which are at variance with public rights. Ever since the famous case of Darcy v. Allen,[1] our law has recognised as rules of indisputable authority, that the subject is entitled to the fruits of his own industry, that as trades are not created, so they cannot be restrained by, the crown, that patents must be confined to new inventions, or to the importation of new trades from foreign countries, and that with these exceptions, the only mode of obtaining an exclusive privilege is a direct application to the legislature. In advocating the propriety of converting partnerships into corporations, we trench upon none of these principles. We do not wish to concede to the trader any of those advantages, which operate as impediments to the exertion of others; but we wish to see him invested with the peculiar character, which will enable him to enter into free competition with every possible advantage.

Mr. Cory has alleged many reasons, of which we fully admit the cogency, in favour of introducing this mercantile principle into our law. In support of the same suggestion, we shall submit to our readers grounds somewhat different in character, derived from proceedings which have taken place, and from rules which have been established, in our Courts of Law and Equity. It seems to us, that, if the mercantile principle had been originally adopted, many anomalies

[1] Darcy v. Allen, Moor, 637; Noy, 173.

now prevailing would never have existed; many legal doubts, which have perplexed our Courts, would never have been heard of; much litigation would have been prevented, and rules of acknowledged correctness, which have been the fruit of protracted struggles with the obstinacy of common law, would have been recognised as the immediate deductions from a clear and intelligible principle.

One of the agreements made upon the formation of a partnership, is that such and such capital shall belong to the firm. The partners contribute the property, of which the capital is composed, in different proportions; some more, some less; perhaps one or two no capital at all, but only personal exertion, and many of them no personal exertion, but only capital. The contributors of the capital part with it, so far as they are individually concerned, and give it up to the firm. Such are the circumstances which actually take place when a firm is established. Upon these circumstances, precisely as they occur, the mercantile system of account is founded. Our English law-merchant has grown under far less favourable auspices. The right of inheritance, the jealousy of the feudal rules, the authority of the crown in the grant of charters, and the monopoly of privileged bodies, have been among the many impediments to the adoption of a correct system; and it has been only by the determined efforts of men of very powerful understandings, particularly of Lords Mansfield and Eldon, that the rules of ancient law have been so distorted or set aside, as to leave a code for the use of our merchants compatible with commercial practice.

The first anomaly which strikes us in our law of partnership, is the nature of the estates which are created in the different kinds of partnership property. Personal property is said to be held in joint tenancy so long as the joint merchants live, yet on the death of one of them, survivorship, the principal characteristic of joint tenancy, does not take place. If it were, there would be an end to commercial partnerships, for no one would allow his surviving partners to take his property in exclusion of his family. "The rule against survivorship is established," says Lord Coke,[1] "per legem merca-

[1] Co. Litt. 182 a.

toriam, which (as hath been said) is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is pro bono publico; for the rule is, that jus accrescendi inter mercatores pro beneficio commercii locum non habet."

When, however, we come to real property; we find that the common law is too stubborn to admit the rule of the law commercial, and consequently that at law real property is held in joint tenancy. Again, however, the necessities of the merchant have interfered, and the relief, which was denied in the Courts of Law, has been sought in the Courts of Equity. There the interests of commerce have been fairly considered. The intention of the parties has been admitted as a guide, and the result has been that the survivor, who establishes his rights in the Courts of Law, is compelled by the Courts of Equity to surrender the benefit derived from them to the personal representative of the deceased partner.[1] In the one case, then, a species of estate has been created never before known in our courts of justice; in the other, while Courts of Law have maintained their own doctrine in the succession of the legal estate, the beneficial interest has been directed by Courts of Equity into a totally different channel.

The principle of our law has been the source of very curious distinctions respecting the consequences of a partner's execution of different documents. One partner may bind another by the signature of bills and promissory notes, by giving orders or guarantees, and by all the ordinary dealings of a merchant; but he cannot bind him by the execution of any deed which creates an obligation. Let us consider, first, the reason of the rule. Lord Kenyon observes in the first case upon the subject "The power of binding each other by deed is now for the first time insisted on, except in the nisi prius case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety." "This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real

[1] Gow on Partnership, 33; Cory, 119.

lien on the estates of the other partners.[1]" In speaking of the alarm of the mercantile world, Lord Kenyon seems to have forgotten to what an extent one partner can injure the real property of another. His signature in a matter of simple contract binds all the real property of all the members of the firm. If the obligation is not discharged, and the firm become bankrupt, the real property of the members will pass under the bankruptcy to the assignees: if they die, it will be liable under the statute of William and Mary.[2] Lord Kenyon probably meant that the rule would give to a partner the power of placing a favourite creditor before subsequent mortgagees. The rule however might be so made that such should not be the effect, unless the realty in question has been made part of the partnership property; such ought to be the effect, if it has. Upon this particular subject the law is inconsistent. A partner may by deed release an obligation to any amount. The law in all its strictures has been unable to resist the strength of the analogy in this respect; for payment to one partner is payment to the firm, an acknowledgment of the payment made by one partner amounts to an acknowledgment by all the partners, from whence the inference was irresistible, that "if one executed a release of any obligation whatsoever, it should be treated as the release of all.[3] This may seem hard," continues Mr. Gow, "but a deed implies a full consideration, which in the case of a release would be for the benefit of all the partners; and if any prejudice is sustained by the misconduct of one, the law imputes it to the folly of the others, who have associated with a man so neglectful of their interests." The argument is unanswerable, but, we submit, that it should be applied to the creation as well as the release of an obligation, and that in reality one partner is quite in as great jeopardy from the folly of another in the signature of simple contracts, as he ever could be from the signature of specialties.

An attempt was made to oppose an impediment, founded upon the same principle, to the proceedings of parties in bankruptcy. In a case in which a power of attorney to vote on behalf of a partnership in the choice of assignees was not

[1] Harrison v. Jackson, 7 T. R. 210.
[2] 3 & 4 W. & M. 14. [3] Gow on Partnership, p. 60.

executed by all the partners, the commissioners refused to receive the vote. Lord Eldon overruled their objection. The argument used by Sir Samuel Romilly in supporting the application is no less applicable to a partner's signature of deeds. He "remarked[1] the great inconvenience that must be the consequence of allowing this objection from the absence of partners, which cannot be obviated by giving a special power upon leaving the kingdom, as this authority must be a special power of attorney to vote in the choice of assignees in the particular commission and is filed with the proceedings."

Precisely in the same manner, the necessity that all the members of a partnership should execute a deed, is frequently the cause of deeds being sent at considerable expense and delay and risk of loss all over Europe, and indeed all over the world. Nor can we discern any good reason for the continued existence of this inconvenience, except the rigid technicalities of law. Let it be observed that, if the partnership had been viewed in its real light, as an individual person, to whom the partners had only advanced their property by way of loan, this difficulty could never have been suggested. The realty in question, if admitted as part of partnership property, would have been regarded in law as personalty—subject, like any other personalty, to simple contract obligations; and in that state it would have been affected by the deed, with just the same degree of liability which would have arisen from a document not under seal. On the other hand, if the realty were not part of the partnership property, but remained the private property of the individual, it would be liable only as general assets, whether the obligation was created by deed or by mere writing.

Closely connected with this subject is the question, whether land belonging to a partnership is personalty or realty. It affords a striking instance of the growth of litigation out of incorrect legal principles, and even now it does not seem to be absolutely determined. Before the statute of William and Mary, by which the real property of traders was made liable to their debts, this question was of the greatest importance to creditors: since that statute it has affected the rights of widows,

[1] Mitchell, Ex parte, 14 V. 597.

of heirs, and personal representatives, of devisees and legatees. Lord Thurlow appears to have been doubtful upon this point, or rather, if we may judge from the case of Thornton v. Dixon,[1] he regarded the land as realty and not as personalty. The reporter, in a note upon that case, expresses his own doubts, and adds: "The question will probably soon be brought forward again to receive a more solemn adjudication; in the mean time it is well understood to be the opinion of many gentlemen of great professional eminence, that where real estate has been purchased with partnership property for the use of the partnership, it becomes personal property, not only as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner."

The list of cases connected with the question which have since Lord Thurlow's time been before the Court, is very long. Ripley v. Waterworth,[2] Bell v. Phyn,[3] Balmain v. Shore,[4] Crawshay v. Maule,[5] Randall v. Randall,[6] and Bligh v. Brent,[7] may be mentioned as the most important. We believe that according to general opinion, land used in trade is to be considered as personal property. Lord Eldon said in Selkrig v. Davies, " My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal." Upon this dictum Sir Launcelot Shadwell makes the following remark—" The limitation of that proposition is to be collected from the report of the case, by which it appears that the proposition was laid down with reference to a case of a partnership in trade between persons who had land for the purposes of the trade."[8] Mr. Tinney seems to think that the question is not even now set at rest. He says in his evidence on the law of partnership, in answer to an enquiry whether there should be a declaratory enactment that the law is so, " one of the last[9] decisions goes a good way towards that, but it may be better to set it right by express enactment. I think it would be expedient to enact that every interest be-

[1] Thornton v. Dixon, 3 Bro. C. C. 199.
[2] 7 V. 425.
[3] 7 Ves. 453.
[4] 9 V. 500.
[5] 1 Swan. 495.
[6] 7 Sim. 271.
[7] 2 Y. & C. 268.
[8] Randall v. Randall, 7 Sim. 283.
[9] Phillips v. Phillips, 1 Mylne & Keen, 644.

longing to a trading partnership should be considered as personalty."

Now let us consider how the question would have stood, if the mercantile principle of partnership had been in the first instance recognised. We throw out of view those partnerships which have commenced upon strict articles in which provision is made for all contingencies. We allude to those partnerships into which men enter (to use the expression of Lord Eldon[1]) "as into a marriage, for better and worse." In cases of this kind the landed property may have previously belonged to one of the partnership, and have been given as his individual contribution to the firm; or it may have belonged to several of them; or it may have been purchased with partnership money at the commencement or during the continuance of the trade; but to every one of these states of things the same observation will apply, namely, that the land in question belongs to the firm, and not to the individual partners, and is used for partnership, not for individual purposes. The partners will be creditors to the firm, each of them for the value of his contribution, of whatever property it may have consisted, but they will have no right to reimbursement by a share of land, rather than of money. On the occurrence of any of the contingencies to which partnerships are liable, the rule of law will be equally clear. If one partner dies, his personal representative will claim from the firm the value of his share at the time of his death; but, like the claim of any other creditor, it will be subject to satisfaction in money. If there is a bankruptcy, of course real and personal property will equally be forfeited to creditors. If a dissolution of partnership takes place by consent, then any partner consenting to receive land in respect of his share in the concern, will thus exercise an election to increase his real, and to diminish his personal estate. The same are the rules of our law as we believe it is commonly received. So that the Courts after long discussion, and after years of expensive litigation, have only arrived at certain rules, which, if the substance of mercantile contracts had not in the first instance been neglected for the sake of legal technicality, would have been established in the infancy of our juridical system.

[1] Crawshay v. Maule, 1 Sim. 509.

We have already alluded to the anomalous species of joint estates, which have grown out of the legal principle of partnership. We now come to another expression equally calculated to draw persons into error. Partners are frequently said to be the partners as regards the world, but not partners "inter se."[1] For instance,[2] this expression is applied to a firm, in which one of the partners gave as his contribution for the common benefit his personal services instead of any amount of capital. We do not see that the nature of a person's contribution makes him more or less a partner. If the person in question had contributed actual property, he might have been entitled during the continuance of the firm, to a different share of profits, and on its dissolution, to a share of the stock : but in respect of his separate share, we cannot see that he is a partner with any one. Partnership implies a holding in common. This share he takes adversely to all. Partnership implies that if one sues for the property belonging to it, the suit is of necessity for the benefit of the other members of the partnership. But a partner, who sues in respect of his individual share, sues independently of the other partners. Moreover they are of necessity his opponents, as the very object of the suit is to separate his share from their's. Geddes v. Wallace was a case in which Mr. Geddes had no property at all in the firm, though 5-85ths stood in his name. Yet, if the 5-85ths had been his own, would he, upon enforcing his claim to that amount against all the other members of the firm, have been acting as a partner? They would have had no right to any portion of his 5-85ths, nor he to any part of their respctive shares. No state of circumstances can be imagined, in which there is more palpably a total absence of all community of interest, than the position, which he would have occupied in the establishment of his individual claim. The truth is, that in respect of the individual rights of each partner, there can be no such thing as a partnership ; and the idea of a partnership "inter se" would never have arisen, if the partners individually had been viewed in their true characters, as separate and distinct creditors of the firm.

The present rules of law produce great inconvenience by discouraging a partner from acting for pay in the transactions

[1] Gow on Partnership, 80.

[2] Geddes v. Wallace, 2 Bligh, 270.

of the partnership business. Suppose, for instance, that certain members of a partnership are sued for the discharge of a partnership debt; an attorney, who is a copartner, if he is employed in conducting their defence, cannot sue them at law for the expenses.[1] Or upon the formation of a railway company, if a subscriber is employed as surveyor, he cannot at law recover the payments due to him by suing the directors or any of the other members of the company.[2]

In the same way, after a shareholder has supplied goods for the company,[3] and has drawn a bill for the amount, which the proper officer of the company has accepted, if the bill is unpaid, there is no redress at law. Lord Wynford, in commenting upon a case of this description, says, "the case is that of one partner drawing on the whole firm, including himself. There is no principle by which a man can be at the same time plaintiff and defendant." Observations to the same effect, too long for insertion in this place, were made by Lord Tenterden, in the case of Teague v. Hubbard.[4] The result of these cases appears to be, that if the member of a company embarks in its service, he does so under the disadvantage of having no remedy whatever at law for the wages of his labour. Yet he is not unlikely to be the person calculated to do the best services to the company; first, as he has a previous acquaintance with their affairs; and secondly, as he has a personal interest in their success. A creditor of the firm could act as their servant without being subject to this disadvantage; yet a creditor's chance of recovering the sums due to him depends, like a shareholder's chance of profit, upon the general success of the company. Independently then of legal technicality, there is no reason why the partner should not sue the firm. When the company wish to obtain the services of their own member, this discouragement is interposed by the peculiar character of our law.

Another mischievous consequence of the present law is, that in case of the outlawry of one partner, or his attainder for treason or felony, all the partnership effects become vested in the crown. "For," says Mr. Justice Blackstone,[5] "as it is not

[1] Milburn v. Codd, 7 B. & C. 419.
[2] Holmes v. Higgins, 1 B. & C. 74.
[3] Neele v. Panton, 4 Bin. 151.
[4] Teague v. Hubbard, 8 B. & C. 349.
[5] Com. ii. 401.

consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but where they interfere, he is always preferred to that of another person: from which two principles it is a necessary consequence, that the innocent though unfortunate partner must bear his share in both the debt and the house, or in any other chattel in the same circumstances."

A more serious grievance arising out of the legal principle, is that an ill-advised partner, or the executor of a deceased partner, can insist upon a sale and division of the partnership effects; and thus, as Mr. Cory observes,[1] "oppress the continuing partners, leaving them no alternative between the ruinous consequence of a stoppage of business and buying him out at a price extravagant beyond all bounds." A similar[2] evil arises upon the bankruptcy of a partner. Were the partner to be viewed as a creditor, a Court of Equity would deal with him upon that footing. If an attempt were made to dissolve the firm, the Court would make a decree quieting the other partners in the possession of the partnership effects, but ordering them to account for the sum due to the individual partner.[3] Or, in case of the death or bankruptcy of a partner, it would decree that the surviving or solvent partners should be allowed to carry on the firm, having paid to the representatives of the deceased, or to the assignees of the bankrupt, the sums in respect of which he was creditor of the firm.

The anomalies, which we have mentioned as arising out of an incorrect principle of partnership, are trifling in comparison with those which have been produced in bankruptcy. We will mention some of the rules, by which the rights of creditors and partners are determined, and then point out the difference which might have obtained, if the mercantile principle had been adopted.

It is a rule that joint creditors shall prove against joint estate, and separate creditors against separate estate. Lord King is said to have adopted this rule for convenience. Lord Hardwicke followed it, as settled by his predecessor. Lord Thurlow adopted a totally different rule, and admitted the proof of all debts pari passu. Lord Loughborough restored

[1] Cory, 156. [2] Wilson v. Greenwood, 1 Swan. 471. [3] Cory, 130.

Lord King's rule, and was followed by Lord Eldon, although he repeatedly expressed his inability to see the justice, on which it rested. Our readers will observe the fluctuation of these decisions; they may easily imagine how much litigation has been the consequence. But let us consider the merit of the rule itself.

"Mr. Christian[1] puts the case of five partners, having each a separate estate of 20,000*l.* and separate debts to the amount of 20,000*l.*, and that the joint debts amount to 100,000*l.* If there should be 10*l.* worth of joint property, this must first be divided among the joint creditors; and therefore a joint creditor of 20,000*l.* would not get a farthing in the pound, while the separate creditor would receive 20,000*l.* On the other hand, if there should chance to be no joint estate, then each joint creditor would be admitted to prove under every separate commission, and would accordingly receive 3*s.* 4*d.* in the pound from each separate estate, amounting to 16,666*l.* 13*s.* 4*d.*, while each separate creditor received only 3*s.* 4*d.* in the pound from one estate, amounting to 3333*l.* 6*s.* 8*d.* The former would get five-sixths, the latter one-sixth of his debt."

The substantial ground, upon which this rule appears to be defended is, that qui sentit commodum sentire debet et onus: that the joint estate, which has the benefit of the credit, ought to pay the sum with which it was credited, and that the same remark applies to the separate estate. It seems, however, to be a more fit subject of consideration, what is the quarter in which the lender has reposed confidence, whether in the firm, or in any individual of the firm. There can be no doubt that a man who lends money to a firm, trusts quite as much to the wealth of individual members, as to that of the firm itself: for which reason he ought not to be deprived of the benefit of the separate estate. But the rules of bankruptcy go to the extreme in the opposite direction. For if the lender has acted with the utmost caution by obtaining from individuals of the firm separate promises to make repayment, he must make his election between the joint and separate estates, and having chosen one, he has but little chance

[1] Henley on Bank. p. 169. See another illustration of the effect of the rule Cory, p. 124.

of deriving any benefit from the other. Of this rule Lord Eldon expressed strong disapprobation. "In bankruptcy, for some reason not very intelligible, it has been said the creditor shall not have the benefit of the caution which he has used. I never could see why a creditor, having both a joint and several security, should not go against both estates; but it is settled that he must elect." The Courts, however, carry the principle only to a certain length; for joint creditors, who prove against joint estate, are not compelled to give up separate securities.[1] Yet morally speaking the cases are in many respects similar: in either case the joint estate has derived benefit from the credit, and the property pledged has, except in very few instances, been equally at the disposal of the separate creditor.

This rule of bankruptcy appears to us so completely at variance with justice, that we cannot pass it without further observation.[2] Lord King observed, "As separate creditors are not to be let in upon the joint estate, until all the joint debts are first paid; so likewise the creditors of the partnership shall not come in for any deficiency of the joint estate upon the separate estate, until the separate estate debts are first paid." To this mode of reasoning an important objection arises, namely, that the partner is responsible for the entire debts of the firm; but the firm is not responsible for the entire debts of the partner: for which reason the rule in the one case justifies no inference in the other. "In the distribution to creditors," says Chief Justice Eyre, "a rule of convenience has been adopted. To understand it, we should see what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner."[3] The chief justice then states the rule of convenience which we have mentioned, and proceeds in these words: "Bankruptcy has been called a statute execution; but if it has any analogy to an execution, it is certainly very much modified, and, as I

[1] Ex parte Peacock, 2 Gl. & Jam. 27.
[2] Ex parte Crowder, 2 Vern. 706.
[3] Bolton v. Puller, 1 Bos. & Pul. 548.

take it, by the authority of the chancellor, who is to take order for the distribution of the effects of a bankrupt."

It is not then from any legal principles that the rule in bankruptcy has been derived; and we may at once come to the inquiry, whether it rests upon good sense? A lender of money, who lends to A., B. and C., will often be worse off than one who lends to A. alone. Yet the first lent in reliance upon all the estates of all the partners separate and joint; the second chose to risk his loan upon the separate estate of one. The rule of law has thus a tendency precisely contrary to that which it ought to have; for it ought to encourage caution in loans as well as in all other speculations. Were the firm and the partner regarded, according to mercantile notions, as two distinct persons, the lender in the joint and separate security would be viewed in the same light as a person who lends upon the security of two persons, one of whom is guarantee for the debts of the other.

Indeed an argument might be raised for carrying still further the claim of the joint and separate creditor. The separate debtor has undertaken to satisfy his debt in two ways; first, in his separate capacity; secondly, in his capacity of partner, in which he is liable to pay all the partnership debts. But a proof founded upon this principle would be a kind of double proof, which would be at variance with all legal notions. It would be one debt proved twice over, upon the ground that there were two undertakings to pay it; while the fact that two promissory notes are given to secure the *same* sum could not entitle a creditor to a larger dividend, than he would receive if such a sum had been secured by only one promissory note.

The general rule is subject to an exception, which in reality amounts to an admission that it is untenable in principle. Where there is a minor partnership distinct in its dealings, and containing some of the members of the greater firm, there may be proof of debts between the two firms. Mr. Gow[1] says, "in such a case proof may be made for the debt in the same manner as if the dealings had been amongst strangers." If the partners may prove, so may the partners' creditors. The

[1] Gow on Part. p. 292.

rule then and the exception, viewed together, are to this effect: If A., B. and C. are engaged in one partnership, and A. and B. in another, the greater partnership and their creditors may recover debts from the lesser in common with the creditors of the lesser. But if there is no lesser partnership, and they make claims against A., B. and C., individually, they cannot enforce such claims, until all the separate creditors of A., B. and C., have received every farthing that is due to them.

The general rule is also liable, as before stated, to this further exception, that if[1] there is no solvent partner, nor any joint estate, the joint creditors may receive dividends out of the separate estate in common with the separate creditors. Still if there is any separate estate, even the most trifling, or a solvent partner, that is, a partner, be he ever so poor, against whom there is no commission, the joint creditors have no claim against the separate estate, except against the surplus which remains after satisfaction of all the separate creditors. So that joint creditors, who have lent their money to a firm worth nothing at all, are often in a better condition, than those who have selected less desperate debtors; or, to state the principle shortly, the greater the imprudence in making the debt, the better the prospect of having it paid. Lord Eldon[2] said that he could not understand the merit of the rule, but consented to observe it, rather than produce fluctuation and uncertainty in the law.

We venture to say that in all these respects the law meets with universal disapprobation. So that after much contrariety of decision, numerous arguments and great expense and inconvenience, we have arrived at conclusions which are at variance with substantial justice. We will quote one more instance, in which a large portion of these evils have arisen, and the great mind of Lord Hardwicke was misled. We allude to the question whether, if a firm is indebted to one partner, the creditors on the separate estate of that partner should be admitted as creditors on the partnership estate in competition with the joint creditors. Lord Hardwicke[3] de-

[1] Gow on Part. p. 172.
[2] Ex parte Pinkerton, 6 Ves. 814.
[3] Gow, p. 290.

cided in the affirmative. Lord Thurlow overruled his decision; and has been followed by Lord Eldon. According to Lord Hardwicke's doctrine, a partner could prove a debt against his own partnership; in other words, a person could make a claim against an estate, for all the debts of which he was himself responsible.

Before we quit the discussion of this general rule, we must observe another most unjust consequence, which, in conjunction with the kind of joint tenancy admitted in partnership, it is calculated to produce. A surviving partner, who sues for a debt due to him in his own right, is liable to the set-off of a debt due from him as surviving partner[1]. The joint debt is thus paid out of the separate estate, to the great injury of the separate creditors. On the other hand, if a surviving partner is sued for a debt due from him in his own right, he may set off a debt due to him as surviving partner[2]. The separate debt is thus paid out of the joint estate; and the joint creditors and representatives of the deceased partner are in a corresponding ratio deprived of the property of which the death, which has occurred, has accidentally deprived them. In the latter of these cases it was pressed upon the Court, that the obligations were really contracted in different rights, and that there was no mutuality in the rights or characters or capacities, although there was in the persons, of the plaintiff and defendant. The Court overruled the objection as quite untenable. The injustice of the case, too glaring to escape notice, flowed of necessity from the legal principles of partnership.

We shall not be justified in finding fault with the principle, in which this course of legal decisions originated, unless it appears that mistakes and doubts of this nature would have been less liable to occur, if the mercantile principle of partnership had been in the first instance adopted. Supposing then such to have been the case, let us see how the question would have stood. We may imagine two partnerships to exist; A. B. and C.; and A. and B. These two partnerships would upon the mercantile principle be regarded as distinct corporations or firms, and also as respectively distinct from the several individuals A., B. and C. Now let each of the firms become bankrupt. The two firms could prove against each other as being separate and distinct persons or bodies; but the individuals

[1] French v. Andrews, 6 T. R. 582. [2] Slipper v. Stidstone, 5 T. R. 493.

A., B. and C. could not prove against either of the firms, because they would be themselves responsible for the debts of them both. For that very reason the two firms, and also in their right their respective creditors, may prove against the individuals. The principle of adjusting amongst the partners their respective equities would be adhered to, and after the joint creditors had exhausted the partnership assets there would remain the account of what each partner owed to the firm, as his share of the aggregate loss; a sum, which he is as much bound to pay, as he is to pay any one of his separate debts; a sum too, which the separate estate has derived from the joint estate, and which on that, if on no other account, the claimants of the separate estate ought not to enjoy in exclusion of the claimants of the joint estate. In respect then of this sum the joint creditors would be entitled to come in pari passu with the separate creditors, and thus the joint and separate creditors of A. would have two modes of reaching him; one as he is a member of the firm; the other in his individual capacity; and if such creditors had taken the precaution of obtaining a specific security, they would enforce it in perfect consistency with their general rights. In this manner the mercantile principle of partnership would enable us to get rid of those rules of bankruptcy, which have met with as much disapprobation amongst enlightened judges, as amongst the ablest members of the mercantile community.

Nor is it merely in respect of the rules in bankruptcy that the benefit would be felt. There would be an end of many other anomalies, of which some have been particularly mentioned; there would no longer be joint tenancies without survivorship, nor tenancies in common under conveyances which import joint tenancy. The land would always belong to the firm, and never to the partner: his claim would be confined to a pecuniary debt, determined in amount by the extent of his interest in the firm. For the same reason there could be no inconsistent distinctions between the power of a partner to bind the firm by specialty or by simple contracts. Again, the mistakes which have arisen out of the notion of a partnership inter se would never arise, for it would be at once apparent that there was nothing joint in the reciprocal relations of different persons, debtor or creditor, to the firm; and that although similar liabilities to supply the losses, and rights to

enjoy the gains of the firm attached to all, still, as to their respective gains or losses, they are entirely distinct. In addition to these advantages in the clearness of legal rights, the members of the firm could engage themselves in its service without any apprehension that, after the discharge of their duties, they might encounter difficulty in asserting their claims to remuneration.

We rejoice to observe that the tendency of our more recent legislation is to recognize the mercantile principle of partnership. This inclination appears in the history of the laws respecting partnership which Lord Eldon[1] gave in 1826. In the same year an act[2] was passed, enabling certain banking partnerships to sue and be sued in the names of their public officers, as well in disputes with their own members as in those with strangers. The same principle pervades other acts[3] passed in 1838, 1839 and 1840. An act passed in 1834 deserves still greater attention, as it is applicable to partnership of almost all descriptions. By that act[4] "Her Majesty is empowered to grant without a charter to any company or body of persons, associated together for any trading, charitable, literary or other purposes, any of those privileges which according to the existing law Her Majesty might have granted with a charter."

Still further evidence of the recognition of this mercantile principle is to be found in the following observations of Baron Alderson: "The property is money,[5] the subscriptions of individual corporators." "Suppose the subscriptions had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body? And yet that is in truth the case; for the individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation,' as any other of Her Majesty's subjects are."

C.

[1] Van Sandau v. Moore, 1 Russ. 458. [2] 7 Geo. 4, 46, 9.
[3] 1 & 2 Vict. 96; 2 & 3 Vict. 60; and 3 & 4 Vict. 111.
[4] 4 & 5 Wil. 4. 94. [5] Bligh v. Breat, 2 Y. & C. 295.

ART. II.—ADULTERY.—IS IT INDICTABLE?

THE general opinion being that adultery is not punishable in a criminal court, and this state of the law being universally regretted, we trust that our readers will bear with us patiently, while we lay before them "divers good and weighty reasons" for doubting at least the infallibility of this general opinion.

The learned Emlyn says: "I confess I see not but that adultery is indictable by our law. Godolphin, in his Repertorium, c. 34, s. 10, admits it to be a temporal offence against the peace of the realm, for which sureties of the peace may be required; and Lord Coke says, that in ancient times it was punishable in the tourns or leets by fine or imprisonment, by the name of letherwite.—2 Inst. 488; 3 Inst. 206. It is allowed on all hands, that an indictment lies for seducing a servant away from his master's service, and that the same reason extends to the seducing the wife from her husband. Of this there is a precedent in Tremaine's Entries, pp. 209, 213, 214, the King against Mountague, 1 Jac. II.; and another in Offic. Cler. Pac. 311. Though these were cases where the wife went away with the adulterer, yet the reason holds proportionably where she is seduced to a breach of her fidelity and trust, though it be without going away. If a man debauch his wife's sister, this has been held a misdemeanour punishable by indictment or information. This was the case of Lord Grey for debauching the Earl of Berkeley's daughter; see Trials, A. D. 1682: and of the King against Heathcote, for debauching Mr. Holworthy's daughter, Trin. 7 Geo. I. (1720), B. R. Rot. 46. *Sure it is no less injurious to debauch another man's wife, but still it is punishable only as a misdemeanour, and not with that severity as the guilt of the offence requires, and the laws of other nations have thought it to deserve. So that the injured party is in a manner obliged to betake himself to a civil action for damages;* though, as Mr. Wollaston says in the place cited below, the offence is of such a nature that no satisfaction can be made for it, if the injured man thinks so, as he generally does. If this be so, the law should be so framed as rather to deter from committing the crime, than to make amends for it after it is committed."—Howel's State Trials, vol. i. preface, xxxiii, note.

Emlyn then is clearly of opinion that adultery is punish-

able as a misdemeanour, and points out the real cause of its not being usually so punished for the last century—the comparative leniency of the punishment that could be inflicted. He himself dwells at great length on the fact of its being punished with death, exoculation, &c. &c., by the laws of other nations, and observes that the "severity of our law, in inflicting capital punishment upon the lighter crimes of pilfering and thieving, seems the more extraordinary when one considers the great indulgence shown to one of the first magnitude, and which is productive of much more mischievous consequences—I mean adultery." He insinuates that it is on account of its being a fashionable crime it is not punished with the measure extended to the offences of the lowly vulgar, and leaves us to infer that he would have no objection to have it made felony. This was all in accordance with the feelings of his time. Nothing less than hanging or transportation was considered deserving of the name of punishment in those days, and parties therefore, as they could not subject adulterers to either of these processes, preferred the course which would gratify them with the next heaviest punishment—proceeding by action, and getting satisfaction and revenge in the shape of damages and costs. Hence, for the last century, no attempt has been made to punish adulterers by criminal prosecution. But as more correct opinions now prevail on the subject of crime and punishment, and as most people now would consider fine and imprisonment adequate punishment, let us see what are the authorities on which the general opinion as to adultery not being an indictable offence is founded.

Emlyn cites two only: Coke, 2 Inst. 488; 2 Salk. 552. The former is in these words: "In ancient time the King's courts, and specially the leets, had power to enquire of and punish fornication and adultery, by the name of Letherwite, and it appeareth often in the book of Domesday, that the king had the fines assessed for those offences, which were assessed in the king's courts, and could not be inflicted in Curia Christianitatis."

This is a commentary on the first paragraph of the statute *Circumspectè agatis*, warning the common law judges not to punish the Bishop of Norwich and his clerk for holding plea in Court Christian of things merely spiritual, "to wit, of corrections which prelates make for mortal sin, viz. for fornica-

tion and adultery, and the like, for which sometimes a corporal, sometimes a pecuniary, punishment is inflicted." No one could construe such a clause into depriving the King's courts of their ancient jurisdiction. Coke does not so construe it; but he leads us to infer that it had such an effect. He does not say how they were deprived of this jurisdiction, nor even does he distinctly state that they were deprived of it, but he leaves room for inferences. In the 3 Inst. 206, he again says, " for although adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or brothel-house, being as it were a common nuisance, is punishable by the common" (law). Here again he does not state distinctly, but only inferentially, that adultery is not punishable by the common law. But as he himself proves that anciently it was so punishable, nothing less than a distinct enactment could deprive the courts of their jurisdiction, or a solemn decision by the judges that the ancient practice was against law. The passing dictum of a commentator, however high his character, will not supply the absence of the one or the other.

The passage in Salkeld is—" Per Holt, C. J.: If one commit adultery, and the husband bring assault and battery, this shall not hinder the Spiritual Court, for 'tis a criminal proceeding there, and no indictment lies at common law.—1 Roll. Abr. 295; 2 Inst. 488." In *Holt's* Reports this dictum is merely varied to averring that an indictment of assault and battery will not lie for adultery committed without violence. The same authorities are quoted.

The reader knows already how far the dictum is supported by the passage in the Institutes; that referred to in Rolle's Abridgment is—" If a man say of another that he keeps a bawdy-house, and is sued for this in the Spiritual Court, though he may have an action at common law, yet the spiritual law has a concurrent jurisdiction in this, and the words are mixt, and for this no prohibition lies.—37 H. VIII. 14 b, per Fitzherbert." There is another passage in p. 296 (both are in 2 Roll. and not in 1 Roll.) to the following effect: " If a man say to another Thou art a bawd, a filthy bawd, and a common bawd, and for this is sued in Court Christian, no prohibition lies, *for he cannot be indicted for it, if it be true,* as he does not say that he keeps a bawdy-house, which is presentable in the leet."

The dictum of Fitzherbert above referred to by Brooke is in these words: "Some things are mixt and punishable in both laws, as if a man says that another keeps a bawdry or the like, and for these one can select where he will bring his case."

To prevent misconception and to lay all the grounds for for forming a right opinion upon this question plainly and satisfactorily before our readers, we must add that this observation was thrown out in the discussion of the question, whether an action would lie for calling a man a heretic, and the judges thought it would not, for they could not discuss whether any particular doctrine was heretical or not; but, said they, "if it were a case where we could determine the principal matter, as *thief* or *traitor* or the like, for these an action lies, for we have cognisance of what is treason or felony, but if it were for calling him an adulterer, or as the case is here, no action lies, for the reason aforesaid." The King's Bench would not say now that they could not take cognisance of what was adultery.

As almost all the arguments derived from the preceding passages rest on the point, that a man cannot bring an action for being called an adulterer, so we may dispose of them by observing that neither can he for being called a thief, robber, &c. &c. (taking the term as one of general abuse), though he may, if charged with any act of theft, robbery, &c.—Bull. N. P. c. 1; 3 Wilson, 184; Espinasse, N. P. title Slander. A man cannot be indicted as a common bawd, 1 Salkeld, 382; but neither can he as a common thief. Will it follow from this that a man cannot be indicted for an act of bawdry, theft, or adultery? The whole of this turns on the principle in the law of slander which does not allow an action for words (of this kind), unless they charge the commission of an indictable offence. It may be questionable whether an action would lie more for saying a man was a bawdy-house keeper, than for saying he was a thief, though it does for saying he keeps a bawdy-house. The one charges a specific act, the other refers to general character.—See 1 Mod. 31.

The great source of mistake lies in perverting the examples given in Brooke and the Year Book into principles, inferring more from them than the words strictly construed will allow, and concluding that, as keeping a bawdy-house is specified as an indictable offence, no other act of bawdry is indictable. Is the

law so? On the contrary, an indictment lies for frequenting a bawdy-house.—Willow's case, Latch. 173; Wheelhorse's case, Popham, 208, Wood's Institutes, b. 3, c. 3, p. 399; for conspiring to seduce a young lady from her father's house and debauch her, Lord Gray's case, 9 State Trials, 127; for debauching a young lady under her father's protection, Mr. Heathcote's case; for assigning a young girl as an apprentice to a gentleman under pretence of learning music, but in reality for the purpose of prostitution, 3 Burr. 1438; for formally assigning one's wife to another man, ib.; for procuring a gentleman's son to marry a woman of bad character, 7 Mod. 39; for abusing and lying with an infant child, though not succeeding in having carnal knowledge of her, Blackerby's Cases in Law, 142; for all acts of open lewdness, Wood's Institutes, b. 3, c. 3, p. 400; Sedley's case, 1 Siderf. 168.

We may here observe that, though Emlyn seems to think in Lord Gray's case that the gist of his offence lay in the Lady Henrietta's being his wife's sister, this does not seem to have been the opinion of the prosecutors, for this circumstance is stated only in a parenthesis in the information, and no direct evidence of it was given on the trial. The gist of the offence, as laid in the information, seems to have been their conspiring to induce the lady, "then a virgin unmarried within the age of eighteen years, and one of the daughters of the Right Honourable George Earl of Berkeley (the said Lady Henrietta Berkeley then and there being under the custody, government, and education of the aforesaid Right Honourable George Earl of Berkeley her father)," to desert her father and live in fornication and adultery with Lord Gray. They were tried at the King's Bench bar before Sir Francis Pemberton, C. J., Sir Thomas Raymond, Sir Thomas Jones, and Sir W. Dolben. The Attorney-General and Solicitor-General were among the counsel for the prosecution, and Holt one of those for the defendants, yet not a word was dropped as to such an information not being sustainable at common law. Christian also observes that the fact of the Lady Henrietta's being the sister-in-law of Lord Gray was not regarded as the gist, but merely as an aggravation of his offence, 4 Bl. Com. 65, note.

Having thus disposed of the authority for Holt's dictum, let us examine the point in another view. Adultery is a merely spiritual offence, and therefore cannot be criminally cognizable

in the temporal courts. How is it more *merely spiritual* than the preceding offences? But if it be a merely spiritual offence, why allow an action at law for it? No action lies for any other *merely spiritual offence.* Who says that it is a merely spiritual offence? We have never seen an authority to that effect. On the contrary, it is so far a temporal offence against the peace of the realm, that "justices of the peace may out of their sessions require surety for the good behaviour of such as offend therein, as also of such as by common fame are reputed resorters to houses suspected of maintaining adultery or incontinency, of such as keep such houses, of lewd women found in such houses, of common whoremongers and common whores, (28 Eliz. by Wray, Anderson and Manwood, Crom. 140).[1] And upon information given to a constable that a man and woman lie in adultery or fornication together (or that a man and woman of evil fame or report are gone to a suspected house in the night), the officer may take company with him, and if he find them so, he may carry them to prison or before a justice of the peace, to find sureties for their good behaviour,—13 H. VII.; 10 Br. Travers, 432;" Godolphin, Repertorium Canonicum, c. 34, s. 10.

Wood says "adultery and fornication are offences temporal, as well as spiritual, being offences prejudicial to men's bodies and estates as well as to their souls, and highly destructive of the publick government."—Inst. b. 3, c. 3, p. 399. Anciently, according even to Coke, it was indictable in leets and tourns. In the Year Book, 1 H. VII., f. 6, we find a prescription in the city of London,—authorizing any person, with the aid of a constable, to commit an adulterer to prison if caught in a house suspiciously with an adulteress,—supported for the following among other reasons: "It was good for the conservation of the peace and good government, for in every adultery there is a wrong according to our law done to a third person, to wit, the husband;"... "which is not only a wrong to him, but *also a disturbance of the peace, and a grievance to all his neighbours.*" "*And as to what was said that it was a spiritual offence and should have spiritual correction, this is not much to the purpose* (ceo n' ẽ grandment a purpos), for by the law of holy church, if the husband catch a priest in adultery with his wife, he can kill the man and his wife for the

[1] See also Wood's Inst. b. 3, c. 3, p. 399, and Dalt. J. P. c. 124.

wrong done to him; and this law proves a wrong done to the husband, and it is a great sin and peril by the law of God and man, and the occasion of it may destroy the entire city or borough: *for the neighbours would call him Cookold, and from this would spring a grudge, and from this battery and manslaughter, and thus great disturbance of the peace and good government,* which is prohibited, according to Bracton, by the law of the Romans, the French, and the English, and the King of England forbids all these things under grievous temporal penalties;" . . . "*for adultery is a temporal as well as a spiritual matter, and is against the peace of the land, for the peace of the land is that every body should be at peace in his own house with his wife, children, goods, and chattels, and whoever wrongfully disquiets him in any of these, breaks the peace and the public weal of the same city or borough.* And if any one enter his house to rob him, it is felony or burglary; and if it be to take his goods, it is felony or trespass at least: *then to take and mis-use his wife is a greater trespass, the greatest shame and villany, and a great cause of breaking the peace and the publique weal of the same city.*" (Donq̃ a prend[e] et misuser sa femme est plus grand trespass, le plus shame et villeny et grand cause d' enfrend' del' paix et del' publique weal deins m̃ l' cite.—f. 7.)

A clearer declaration than this there could not be, that adultery is a crime against the peace of the realm, and as such punishable in the temporal courts. On this ground alone an indictment should lie for it. At common law, an indictment lies for a libel though true, in consequence of its tendency to produce a breach of the peace.—5 Rep. 125. Will it be said that a libel has a greater tendency to produce a breach of the peace, than an offence which all but justifies the husband in killing the perpetrator of it, if caught in the fact? Can there be any offence which leads more directly to a breach of the peace? It is, in the words of Erskine, "in every legal sense of the expression a misdemeanour, and it is a distortion of the very elements of criminal law not to deal with it as a crime." —Parl. Deb. v. 25, 311. By what principle of law then are we prevented from dealing with it as a crime?

But we have not only principles but precedents in favour of indictments for this offence. In Comberbach, 377, we find a case in these words: "Rex v. Johnson. The defendant ap-

peared to be fined upon an indictment for seducing and lying with another man's wife. Northey moved to charge him with an action; but the Court would not suffer it now that he comes to submit to a fine." This was in the eighth year of William III. Four years afterwards we find the King's Bench refusing to quash an indictment for adultery on motion, "but demur if you will."—Rex v. Sellinger, Tr. T. 12 Will. III. 12 Mod. 413. In Tremaine's Entries we find two precedents besides that noticed by Emlyn;—one, Rex v. Dingley and wife, 2 Jac. II. for seducing a wife away from her husband without any charge of adultery; and another, Rex v. Aleway, 35 Car. II. for seducing away a man's wife and living in adultery with her. Tremaine's work was published in 1723, and as he was a lawyer of eminence, we must suppose he would not insert these forms without a comment if any doubt had been entertained respecting them. The *Officium Cleri Pacis* was published in 1726. Its containing such a form is strong additional proof of the opinion of the profession at that time on the subject. In Comyn's Digest, last edition, title Indictment (D), we find "debauching another man's wife" mentioned as one of the offences for which an indictment lies; but under the title Leet (L 4), he says an indictment will not lie now, though it did formerly, but takes care to add, "*per Holt*, 1 Salkeld, 552;" thus clearly implying that he wished that it should not be forgotten that this was Holt's solitary dictum. Need we again remind the reader of Emlyn's deliberate opinion?

In short, adultery, having been declared by ancient and modern authorities a temporal offence against the peace and weal of the realm,—being obviously a crime against public order, morals and decency,—and having been punished by indictment or information up to the early part of the last century, must be still subject to the criminal cognizance of the king's courts, unless their jurisdiction be ousted by some statute, decision, or incontrovertible authority.

But it may be said, that the punishment awardable to adultery, merely as a misdemeanour, would be quite inadequate to its enormity. Would not fine and imprisonment, at the discretion of the King's Bench, be better than total impunity? By the bill proposed in 1800, it was to be treated only as a

misdemeanour, and punished as such, by fine and imprisonment, or either, at the discretion of the Court. We may add, that by that bill it was provided, that no bill of divorce was to be presented to parliament unless the party seeking it should have prosecuted the adulterer to conviction and judgment, or outlawry.

As the public can never be satisfied that adultery is an indictable offence till they see the law actually enforced, we would recommend those gentlemen who have within the last twelve months or so recovered damages against the destroyers of their happiness, to proceed at once by indictment or information, expend a portion of these damages, if they have been paid them, in seeking a real gratification of their natural and justifiable feelings of indignation, and thus put an end, expeditiously and cheaply, to all doubt on this question, and perform a lasting benefit to the peace and morals of society.

Knowing that an immense amount of incredulity will prevail as to the real and technical character of the precedents to which we have referred, we append the following literal translation of one of the shortest of those in Tremaine.

" The King v. Aleway, Easter T. 35 Ch. II., Roll 41.

Bucks, to wit. } That Thomas Aleway, late of Great Marlow, in the county of Bucks, barber-surgeon, being a person of bad name, fame and reputation, and of most wicked conversation, and planning and intending by unlawful, impure and diabolical ways and means, to spoil, break and disturb the peace and quiet of one Owen Blower, late of the same place, maltster, he, the aforesaid T. A., not having God before his eyes, but moved and seduced by the instigation of the devil, on the 1st day of June, in the twenty-fifth year of the reign of the lord Charles the Second, now King of England, &c., at Great Marlow aforesaid, in the county of Bucks aforesaid, wickedly, impurely, flagitiously and diabolically tempted, incited and solicited one Anne, then and still being the wife of the aforesaid Owen, to desert the aforesaid Owen her husband, and to fly (*Anglice*, to elope) from the aforesaid O., and to commit adultery, and live in adultery with the aforesaid T. A. And furthermore the same coroner and attorney of the said lord the king saith for the said lord the king, that the aforesaid T. A., in further prosecution of his most wicked machinations and intentions, then and there, to wit, between the aforesaid 1st day of

June, in the twenty-fifth year of the reign of the said lord, the now king aforesaid, and the day of the exhibition of this information, at the parish of Great Marlow aforesaid, in the county of Bucks aforesaid, unlawfully, unjustly, most wickedly and diabolically solicited, incited, persuaded and procured the same A. B., then and yet being the wife of the aforesaid O. B., from the aforesaid O. B. her husband, without the licence and against the will of the aforesaid O. B., to fly, depart and elope, and with the aforesaid T. A., in divers secret places to the aforesaid coroner and attorney and the aforesaid O. B. entirely unknown, to cohabit and remain, by which unlawful, most wicked and diabolical solicitations, incitations, persuasions and procurations of the aforesaid T. A., the said A. B. the wife of the aforesaid O. B., then and there, from the aforesaid O. B., and from the companionship, habitation and society of the aforesaid O. B., her husband, without the licence and against the will of the aforesaid O. B., retired and withdrew and absented herself, and with the aforesaid T. A., in the said divers secret and most wicked places, by the space of eight years and more remained and cohabited, and with the same T. A. lived in adultery. And that the said T. A. then and there, within the time aforesaid, unlawfully, most wickedly and diabolically the same A. B., without the licence and against the will of the said O. B., her husband, from the aforesaid O. B., her husband, having departed, withdrawn and eloped, received, maintained and abetted, against the will and without the licence of the aforesaid O. B., her husband. And that the same T. A. then and there had also carnal knowledge of the body of the aforesaid A. B., the wife of the aforesaid O. B., and with the aforesaid A. B. then and there unlawfully, most wickedly and diabolically committed the crime of fornication and adultery, and in adultery lived; to the great displeasure of Almighty God, to the severe loss and disconsolation of the aforesaid O. B., to the evil example of all others in like case transgressing, and against the peace of our lord the king his crown and dignity," &c.

(By the French *Code Penal* (Art. 336—339), the wife convicted of adultery is subject to imprisonment for not less than three months or more than two years. But the husband alone can prosecute, and he may at any time remit the sentence by taking her back. The paramour is liable to the same amount of imprisonment, and a fine of from 100 to 2000 francs. The husband is liable to the same fine for keeping a mistress under the conjugal roof.)

P. M.

ART. III.—THE GUARDIANSHIP OF BASTARDS.

In our recent articles upon the guardianship of infants, the conduct of the early legislators of this country was necessarily represented in an unfavourable light. It appeared that in the days of tenure by chivalry, our lords claimed the guardianship of the infant lieges, solely with a view to the enjoyment of their property, and that the same motive prevailed amongst those humbler classes who rested their claims to guardianship upon the old principles of Saxon law. The generosity of our ancestors was brought still further into question when we found, that, after the abolition of feudal tenures and the enactment of the statute of wills, nobles concurred with commoners in one and the same determination, not to assert their claims to the guardianship of infants, whose property was committed to other persons in the character of trustees.[1] Thus we gathered as one result of our investigation, that the motive upon which the protection of orphans was formerly founded, was not an anxiety for the orphan's welfare, but the self-interest of the guardian.

We cannot present our readers with any more agreeable view of the character of our ancestors, as displayed in that department of the law of guardianship upon which we now propose a short discussion. Even in the celebrated event of the reign of Henry the Third, when it was proposed to adopt the principles of the civil and canon law in the legitimation of children by subsequent marriage, and when the innovation was resisted by the barons, we fear that they were not influenced either by high moral and religious principles, or by any disinterested zeal for national institutions. "The bishops[2] prayed the nobles to consent that all such as were born before matrimony should, consistently with the law of the Church, be deemed legitimate, and be entitled to succeed to the inheritance equally with those born within wedlock. But the statute says, omnes comites et barones unâ voce responderunt quod nolunt leges Angliæ mutari, quæ huc usque usitatæ sunt et approbatæ." In considering this event we admit the

[1] Law Mag. vol. xxiv. p. 88.

[2] Reeves's Hist. of English Law, vol. i. p. 66.

justice of Sir Edmund Head's opinion, which he has expressed in his very able report upon the law of bastards: "I fear[1] that we cannot attribute the resistance of the English barons to any deep views as to the expediency of discouraging concubinage. The obvious reflection, 'the more bastards the more escheats,' was much more likely to have produced this celebrated declaration, for we do not find that the law was quite so zealous in vindicating the prerogative of wedlock when the rights of the bastard came in contact with those of his legitimate brother, and not with the rights of the lord. Thus, the 'bastard eigné,' or child born before its parents' marriage, if he died seised, might transmit the estate to his own son, to the prejudice of his legitimate brother, the 'mulier puisné,' as he was termed. But it was only the brother's rights, not those of third parties, which could thus be barred. Again, in Bracton's time it seems to have been the law that a bastard could not give land, unless he had heirs of his body, or he had made lawful assigns thereof conformably with the terms of the donation. Reeves observes, 'This restriction on the alienation of a bastard seems to have been imposed in favour of the lord, who, as the law now stood (though it was otherwise in Glanville's time), would, on failure of heirs, succeed by escheat.'"

There are persons who maintain, that, if we look to the statute of Elizabeth, in which provision was made for the maintenance of bastards, and to those of Geo. II. and Geo. III. upon the same subject, we find evidence of a zeal for morality, and of a desire to secure women from vicious temptations. Many of the writings and opinions which were favourably received in these days, are founded upon this supposition, and contain censures upon our present legislators, as falling short of their predecessors in this respect; yet the supposition is hardly consistent with the provisions which those statutes contain. The mere birth of a bastard did not bring them into operation; the offence of illicit intercourse was not the object against which they were directed; one thing more was necessary, namely, that the bastard should be chargeable to the parish; so that unless the mother was a person of the very humblest walk of society, the law had

[1] Sixth Annual Report of the Poor Law Commissioners, p. 164.

no effect at all. Again, the father was to be saddled with a definite amount of expense, depending, not upon the degree of immorality of which he had been guilty, but solely upon the wants of the child. It may be added, that when we examine the mode in which the law was put in force, we find a laxity in the admission of evidence, which savored of a wish rather to obtain indemnity to the parish, than to prevent the commission of crime or secure a satisfactory administration of justice. We think, then, that the legislators who enacted these laws [1] thought more of the rate-payers' finances than of public morality.

Turning, however, to the question more immediately before us, we derive from these enactments very little assistance in our present inquiry. Their tendency is to show that the natural parents are not the guardians. For, if they could in law have been regarded as parents, and upon that ground the guardians, no such special enactments would have been necessary. They would have been regarded as coming within the general principle of the statute of Elizabeth, by which parents are compelled to maintain their children. The more modern statutes, 4 & 5 Will. IV. c. 76, and 2 & 3 Vict. c. 85, s. 1, lead to the same remark. They throw the burden upon the father only under certain circumstances, and thereby imply an admission that, although he is the father by nature, he is not entitled to paternal rights.

In favour of the father's right to guardianship, there has been quoted a class of cases,[2] in which the father has given a bond to the parish, conditioned for the payment of a sum as maintenance for the child. Then, upon an action being brought for the penalty of the bond, it has been alleged by way of defence, that the father has offered to take the child into his own keeping; and the Court has expressed an opinion that the father had a right to do so, and to maintain him in his own custody, instead of leaving him in the custody of the parish officers, and paying to them the sum due upon

[1] See 18 Eliz. 3; 7 Jac. I. 4; 6 Geo. II. 31; 35 Geo. III. 181; 49 Geo. III. 68; 54 Geo. III. 170; 58 Geo. III. 51.

[2] Richards and Salmon v. Hodges, 2 Saun. 83; Hullard v. Malken and Bristow, 2 Wils. 126; Newland v. Osman, 1 Bott, 466; Burwell's case, 1 Ventr. 48; Schuman's case, 1 Ventr. 210.

the bond. The only fair inference from such cases is, that his readiness to adopt that mode of discharging his obligation is satisfactory; and that the parish officers cannot compel him to adopt the alternative of leaving the child in their hands and paying them the money. The defence to the action really amounts to this, that, if the parish officers had acted properly, and had put the infant into his hands, the condition of the bond would have been satisfied, not because the parish would have been indemnified, but because the child could never have been chargeable.

The case of Rex v. Cornfort[1] has been considered a strong authority in favour of the father's right. It was a proceeding under the 4 & 5 Phil. and Mary, of which the second section makes it penal "to take away any woman child unmarried being under the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such woman child." The third section makes it penal to take such a person "out of or from the possession and against the will of the father or mother of such child, or out of or from the possession and against the will of *such person or persons as then shall happen to have, by any lawful ways or means, the order, keeping, education or governance of such woman child.*" One of the judges observed, that under the second section there would have been a difficulty, which there was not under the third. Justice Wright said, "The third section takes in this case, and whether legitimate or not, makes no difference: the putative father of a natural child has a natural right to the care and education of it, and it is an act of humanity in him to do so: he has, therefore, the care of it by lawful means, and the taking her from his possession is an offence within the act." We do not understand what meaning the learned judge attributed to the words "natural right." That the father is guardian by nature, we shall presently find to be a proposition altogether untenable. But whatever his meaning was, all doubt upon the main question is removed by the following observations of Lord Mansfield, in a case decided upon the same statute, the case of Rex v. Felton and Wenman:[2] "Neither the putative father

[1] Rex v. Cornfort, 1 Bott, 459. [2] Rex v. Felton and Wenman, 1 Bott, 478.

nor mother has the legal right of guardianship; and if the putative father, having an order of bastardy made on him to contribute to the maintenance of the child, has a mind to take the child and provide for it, the parish cannot insist on his paying towards the maintenance while in his own custody, and that he thought in this case, where the justice had ordered the child to be delivered to the mother, he (the justice) had done wrong, the father being in good circumstances and the mother poor, and that the circumstances of the parents should direct them in these cases."

We cannot attribute any weight to the observation, that, in some cases,[1] the Court of Chancery have been guided by the father's will in selecting a guardian for the bastard child. This circumstance only shows that the Court has very wisely considered the opinion of the deceased father the best rule to be adopted in the exercise of the Court's independent and undoubted power of selection. In cases of legitimate children, in which the father has a power of appointment, which he has failed to exercise, having omitted to execute his will correctly, the Court will make an appointment upon the same principle.[2]

We now come to the claim of the mother to the guardianship of her bastard child. This claim is far more plausible than that of the father, for, although in general it is difficult to discover who is the father, the mother, except in cases of foundlings, is ascertained beyond all doubt. Lord C. J. Wilmot observed, "I give no opinion whether the father has any power over the child who is nullius filius. Grotius says, truly the mother is the only certain parent. And an order of justices to remove the mother, always removes the child."[3]

The case most frequently quoted in favour of the mother's right is Rex v. Soper.[4] The father of an illegitimate child had fraudulently obtained it from the mother, at whose instance a writ of habeas corpus had issued. Upon a motion to discharge the writ Lord Kenyon said, "the putative father has no right to the custody of the child;" and ordered it to be restored to the mother. We must not infer too hastily from this case that the

[1] Peckham v. P., 2 Cox, 46; Ward v. St. Paul, 2 Bro. C. C. 584; Chettins v. Young, 1 J. & W. 106.

[2] 1 G. & C. 556.

[3] Halland v. Malkin and Bristow, 2 Wils. 126

[4] Rex v. Soper, 5 T. R. 278.

right lies in the mother. In Rex v. Hopkins,[1] a case of similar circumstances, Lord Ellenborough observes, that "the mother of a natural child has no legal right to the person of the child." The principle of all cases of this description is clearly explained by Lord Kenyon in Rex v. Moseley:[2] "Where the father has the care of the child fairly, I do not know that the Court would take it from him, though I do not impeach the propriety of the case cited; but where he obtained possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before." These cases then only show that the Court will interfere to put matters back into the state in which they were before the child had been removed by force or fraud.

There is, however, one case[3] far more favourable at first view to the mother's right. In that case an illegitimate child had, by the common consent of both father and mother, been placed in the care of a nurse. It was afterwards removed by the father into the care of another woman. The father then went abroad, having committed to a friend the superintendence of the child's education. This friend wished that it should be entrusted to some one in whose keeping the mother might have access to it, but the mother insisted that it should be delivered up to her, and with that view made an application for a habeas corpus. Sir James Mansfield said: "There is no affidavit before the Court to show any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely, indeed, that by granting this application we may be doing a great prejudice to the child; but still the mother is entitled to the child, if she insists upon it. The application in this case may have arisen from pure affection, and the mother may be disposed to take care of the child; but it is not probable that it will be so advantageously brought up under her care as under the care of some person whom the father approves of. It often happens that the mother insists upon the custody of the child, not so much out of regard to the child itself, as with a view to make the father pay a sum of money towards its maintenance and

[1] Rex v. Hopkins, 7 East, 579.
[2] Rex v. Moseley, 5 East, 224.
[3] Re Anne Knee, 1 B. & P. 148.

education. Nevertheless the mother must have the child, unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother." If the mother's right is to be inferred from these remarks, we must at once admit their inconsistency with those expressions of Lord Mansfield, which we have quoted from the case of Rex v. Felton and Wenman.

Let us then ascertain the exact limit to which this decision carries us in determining the question. The right of guardianship is not the matter to be settled upon the motion for a habeas corpus. Mr. Justice Lee said, in Rex. v. Smith,[1] "that the right of guardianship could not be determined by them in this summary way, and that the father was not without other remedy: he might have trespass quare filium et hæredem suum rapiat, or other actions, that would properly bring the right of guardianship in question." Lord Mansfield observes, in Rex v. Delaval, "In cases of writs of habeas corpus, directed to private persons, to bring up infants, the Court is bound ex debito justitiæ, to set the infant free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their *discretion*, according to the circumstances that shall appear before them." In accordance with this principle, we find that a wife is not of necessity delivered over to her husband,[2] nor a child to its guardian,[3] nor a legitimate daughter to her father.[4]

The general rules were quoted by us in a former article. We venture to quote them again, as they bear immediately upon the construction which the case of Anne Knee ought to receive. "When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go."[5] "Where the infant is too young to have a choice, we must refer to legal principles to see who is entitled to the custody."[6] There remains a third state of circumstances, that is, where the law has not made any determination upon the right of guardianship, and the child is too young to make a choice. Under these circumstances the Court must exercise

[1] Rex v. Smith, 2 Str. 982.
[2] Rex v. Brooke, 4 Burr. 1991.
[3] Rex v. Johnson, 1 Str. 579.
[4] Rex v. Delaval, 3 Burr. 1437.
[5] Rex v. Greenhill, 4 Ad. & El. 640.
[6] Ibid. 643.

the *discretion* mentioned by Lord Mansfield. The decision in the case of Anne Knee will be made consistent with the other authorities, if the word *must* is construed to mean "must" as a matter of discretion. The father of Anne Knee was abroad. What was the age of the child we do not know; but, as it had been left in the care of a nurse, it probably was very young. It may then be natural to suppose that the child would be unable to choose where it ought to go: and that the Court, in committing it to the care of the mother, was merely exercising a safe discretion, without determining the right of guardianship.

There is another mode of considering the question before us. The common law recognized only four kinds of guardianship,[1] properly so called: "in chivalry, in socage, by nature, by reason of nurture." A bastard can have no guardian in chivalry or by socage, for those rights depend upon the tenure of land and right of inheritance. The same objection applies to guardianship by nature.[2] The only class of guardianship within which the guardianship of a bastard can fall, is guardianship by nurture in the father or mother. Our reason for denying this right is, that there is no satisfactory authority in favour of it; but, on the other hand, we find several authorities in which the right of parents to be guardians has received a general negative, and no exception has been made in favour of guardianship by nurture.

Our readers will perceive that we have not produced a single case in which the right of guardianship of a bastard has been the real point in dispute. This, however, should be no matter of surprise. Bastard infants have rarely any property. As bastards, they can take nothing by inheritance. As infants, they cannot make purchases. If they take by gift or devise, the probability is, that trustees will be appointed to take care of their property. So that there is great improbability that, under any circumstances, they will ever be profitable as wards. This is ample reason why no one goes into a court of law for the purpose of establishing his right to the office of guardian.

Hitherto we have found no answer to our inquiry—who is the guardian to a bastard? We venture to think it clear,

[1] Com. Dig. Guardian (A 3.); Co. 376; Co. L. 886.

[2] Com. Dig. Ibid. (C.)

that neither the father nor the mother is guardian; still less any person appointed by the father's will. Nor can there be guardian in chivalry, nor in socage, nor by nature or nurture. There remains but one species of guardianship; that which is founded upon the principle, that "protectio trahit subjectionem et subjectio protectionem," the guardianship of the sovereign, as parens patriæ.—In a recent Number we endeavoured to show that a numerous class of legitimate infants are subject to no guardian,[1] except the sovereign; we think that upon reasoning of the same kind it may also be established, that the sovereign is the guardian of bastards.

Our readers must not be surprised by the conclusion at which we have arrived. It is in keeping with our ancient doctrines, that a bastard is nullius filius: "Pater est quem nuptiæ demonstrant;" "Qui ex damnato coitu nascuntur inter liberos non computantur." If the right of guardianship, paternal or maternal, had been permitted in respect of a bastard, the connection of parent and child would, in spite of these legal maxims, have to that extent been recognized. Our ancient system was as strict in negativing as in affirming bastardy. "By the common law, if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife have issue no proof is to be admitted to prove the child a bastard (for in that case filiatio non potest probari) unless the husband hath an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is a bastard, albeit he be born within marriage. But if the issue be born within a month or a day after marriage between parties of full lawful age, the child is legitimate."[2]

Our conclusion is consistent with the declaration of the ancient barons, to which we have already referred, and also with all the notions upon matrimony which have prevailed in this country. By the laws of other nations the bounds of legitimacy have been less strict, and divorce has been more easily obtained. "Both by the civil and canon law children born before marriage are made legitimate by the subsequent

[1] Vol. xxiv. p. 89.

[2] Co. Lit. 244 a.

marriage of their parents. This was established in the civil law by the Emperor Constantine, and confirmed by the Emperor Justinian. It was established in the canon law by a constitution of Pope Alexander the Third, in 1160." [1]—"The doctrine of legitimation prevails, with different modifications, in France, Germany and Holland. By an arrêt d'audience of the 21st June 1668 it was adjudged, that if a person marries in England, a woman by whom he had children previous to the marriage, the children born in France are legitimated by it, and acquire all the rights of legitimacy under the French law." [2] But distinctions of this kind have not been admitted in England. The law has here confined legitimacy within narrow limits, and has concurred with religion in investing matrimony with attributes of the first domestic importance, peculiar to matrimony alone. One of these attributes is the claim of the father to be guardian to his child; another is the claim of the child to sustenance and support from the father. If, however, the mother of an illegitimate child could insure for it the father's support, or if the father could establish a claim to its custody, there would be, to the extent of their claims, an encroachment upon the exclusive privileges of

[1] Co. Lit. 245 a, n. (1).

[2] The following curious note upon this subject is taken from the manuscripts of Lord Nottingham. See Co. Lit. 244 a, n. (2).—"In Germany, and with us (who derive many of our customs and political opinions from the Germans), bastardy was always a circumstance of ignominy. But in Spain, Italy, and France, bastards were in many respects on an equal footing with legitimate children. During the first and second races of the kings of France, no difference appears to have been made between their legitimate and illegitimate offspring. The same seems to have been the case of the offspring of all the sovereign princes and higher ranks of nobility in France. Their acknowledging a natural child to be their child, was considered as tantamount to any formal act of legitimation. But the natural children of all other persons were considered as villeins. After the accession of the Capetian line, the condition of bastards was altered for the worse in many respects. Those of royal parentage were excluded from the throne, and were no longer held to be of blood royal. They were only permitted to bear the arms of France with a bar. A similar change took place with regard to the bastards of the princes and nobility. By an ordinance of the year 1600, it was declared that the children of the nobility should not be considered even as gentlemen unless they obtained letters of nobility. On the other hand, the bastards whose parents were of a lower order, instead of being considered villeins as before, began, about the sixteenth century, to be considered as free men, and, except as to the right of receiving and transmitting succession, they are now in France on an equal footing with their fellow subjects."

matrimony. "We are told," says Sir Edmund Head in the Report[1] which we have already quoted, "by many eminent members of the legislature, that to afford a woman who had once broken the marriage tie, an opportunity of even seeing her children for a few moments, was an encroachment on the privilege of wives who had remained faithful, and in this way a direct encouragement to immorality. If this be so, what shall we say to the infringement of the exclusive privileges of the married state, implied by conferring on the mother of a bastard that claim for its support from a definite father, which it is one great object of matrimony to secure? Does not the principle, that any thing short of marriage is sufficient to fix the paternity of the child, involve in itself a direct attack on that institution?"

We do not suggest any opinion, whether the law respecting the guardianship of bastards is the best adapted to promote the morality of the different orders of society. We merely speak of the law as it is, by which it appears that there is no right of guardianship either in the father or the mother, and that the title of the sovereign, in the absence of every other title, of necessity prevails. We further observe that this deduction from legal authorities is strictly consistent with all the maxims which prevails in our law and religion respecting the rights of matrimony.

C.

[1] P. 161.

ART. IV.—PRACTICAL POINTS.

I. *As to Stamps on a Conveyance when Part of the Money remains unpaid, and is secured by Way of Mortgage.*

By indenture of release, dated the 22d January 1820, and made between John Simpson of the one part, and Henry Trotter of the other part: After reciting, among other things, that the said Henry Trotter had contracted with the said John Simpson for the absolute purchase of the messuage and hereditaments thereinafter described and granted and released, and the fee simple and inheritance thereof, at or for the price or sum of 1600*l.*; and that it had been agreed that

the sum of 1300*l.*, part of the said sum of 1600*l.* purchase money, should remain at interest, and be secured to the said John Simpson by way of mortgage of the said hereditaments and premises, in manner thereinafter mentioned: It is witnessed that, in consideration of the sum of 300*l.* to the said John Simpson paid by the said Henry Trotter, and of the sum of 1300*l.* secured to the said John Simpson by way of mortgage as thereinafter contained, the said John Simpson granted and released unto the said Henry Trotter, his heirs and assigns, a messuage and hereditaments in Newcastle upon Tyne: To hold the same unto the said Henry Trotter, his heirs and assigns: To the use of the said John Simpson, his executors, administrators and assigns, for the term of 500 years, subject to the proviso or agreement for cesser of the said term thereinafter contained, on payment of the 1300*l.* and interest, at a time therein mentioned: With remainder to the use of the said Henry Trotter, his heirs and assigns for ever.

This deed also contains an assignment of the residue of two satisfied terms of years to a trustee, upon trust for securing the 1300*l.* and interest, and then upon trust to attend the inheritance.

The messuage and premises comprised in the above-mentioned indenture have lately been sold by the devisee of Henry Trotter, and the title is entirely free from doubt, and has been accepted by the purchaser, subject to a question whether the said indenture of release is properly stamped.

The deed contains eighty-six folios, or five skins, and it is impressed with stamps to the amount of 21*l.*; that is, 12*l.* for the ad valorem conveyance stamp, 6*l.* mortgage stamp, and 3*l.* for progressive duty. But it is contended by the purchaser's solicitor that the progressive duty should have been 4*l.*, and if, according to the right construction of the Stamp Act, 55 Geo. 3, c. 184, the deed should have been stamped both as a conveyance and mortgage, the objection appears to be well founded, but there seems to be ground to contend that the duty actually paid is more than enough.

For the governing principle in the construction of the stamp laws, see 2 Hayes's Introduction to Conveyancing, p. 498, 5th edition.

The first point is, whether the mortgage contained in the

deed in question may not be considered as "incident to the sale and conveyance of the property sold," and therefore is covered by the ad valorem conveyance stamp. See title Conveyance, last paragraph, Hayes, p. 583. The agreement for the mortgage in fact formed part of the contract for sale, and was part of the consideration for the purchase, but of this, further than appears by the deed, the purchaser cannot be put in possession of evidence.

If, however, it should be thought that the clause last referred to should receive a more strict construction, and that it should be extended only to cover matter properly incident to a sale and conveyance, without regard to the particular agreement of the parties; it is next submitted by the vendor, that the mortgage in question is not comprised within any of the definitions of a mortgage given in the Stamp Act.

It is not a security for the payment of money "advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable;" nor is it a security "for the RE-payment of money to be thereafter lent, advanced or paid;" and these definitions comprise the only securities made liable to duty.

If therefore the mortgage in question was not covered by the conveyance stamp, it only required an additional stamp of 1*l.* 15*s.*, and consequently the duty paid was sufficient.

It is also urged by the vendor that, twenty years having elapsed since the conveyance above mentioned, and the title being quite free from doubt, the question as to the stamps may be disregarded. The purchaser, on the other hand, contends that, the deed being material to his title, he has a right to have that deed stamped, so as to be evidence of title, which it would not be if not duly stamped.

The opinion of a very eminent conveyancer was requested, whether the deed in question was sufficiently stamped; and if not, whether the purchaser could require the vendor to have it impressed with any, and if any, what further duty. He was of opinion, that the deed in question was not sufficiently stamped, and that the purchaser could require the vendor to have the deed impressed with an additional 1*l.* stamp.

The opinion, we presume, was given on the ground that the

sum of 1300*l.* retained by the purchaser was a sum "forborne to be paid, being payable;" this, indeed, is the only ground upon which the opinion can be supported. We, however, are inclined to think the position untenable. It is contrary to Lord Hardwicke's celebrated aphorism, "there is no magic in words;" and it assumes that the parties to the deed of January 1820 made two distinct and independent agreements, 1st. That the purchaser should pay down a sum of 1600*l.*, by which the whole of that sum became in the words of the Stamp Act "payable," and then a subsequent agreement that the sum of 1300*l.* should be retained by the purchaser at interest. But what ground is there for splitting the contract of the parties into two separate parts, whereby the assurance becomes liable to a heavier duty? The only evidence of the contract is contained in the deed of release, and that is comprised in *one* recital, viz. that Trotter had contracted with Simpson for the purchase of the messuage for the sum of 1600*l.*, and that it had been agreed [not *subsequently* agreed] that the sum of 1300*l.* should remain at interest, and be secured to Simpson by way of mortgage. This is surely but one contract; it cannot be said that upon such an agreement, the sum of 1300*l.* became payable to the vendor upon the signing thereof, or that he exercised any forbearance in not requiring payment of it; the contract, indeed, plainly is for a present payment of 300*l.*, and for the sum of 1300*l.* to be paid at a future day, and in the mean time to be secured by a charge upon the property, and so it is expressed in the operative part of the deed. We may ask, as Mr. Justice Bayley did in Beete v. Bidgood, 7 Barn. & Cress. 453, "When did the money become due which you say was forborne by the vendor?"—p. 458.

In that case (which applies to the question before us, and which, we think with Tindal C. J., was rightly decided, 1 Mann. & Gr. 324) the Court refused to subject parties to a penalty for usury, though they reserved 6*l.* per cent. interest on such a debt as the 1300*l.* was, and it should ever be remembered, when doubts arise, that the Stamp Acts are laws imposing penalties.

Of course, if the contract recited in the deed had been for the payment of 300*l.* at the time, and for 1300*l.* on the ex-

piration of a year with interest in the mean time, and a charge on the property for the same, there would have been no pretence for saying that any mortgage duty was necessary; but, as it was, we are confident a court would have come to the same conclusion. We may observe in such a case, the interest to be paid at the end of the year should be reckoned as part of the purchase money in fixing the ad valorem conveyance stamp.

Since writing the above, we have learnt that the same conveyancer has advised that a deed, whereby A. B. contracted to sell lands to C. D., in consideration of 6000*l.* to be paid by future instalments, with interest thereon in the mean time, and with a power for A. B. to resell the premises in case default should be made in payment thereof, required an ad valorem mortgage stamp for 6000*l.* We are not surprised that no reason is given for this opinion, and we think it would be difficult to conjure one up even from the depths of the most abundant caution. For ourselves, to adopt an expression of Lord Ellenborough's, we cannot engender or inoculate our minds with a reasonable doubt. We believe that, when questions on the Assessed Tax Acts are referred to the judges, the course pursued is to send a short statement of the facts with a copy of the act under which the duty is claimed; and when the decision is in favour of the tax, those learned persons always under-score the words of the act upon which this opinion is formed. It would be well if conveyancers did the same. To be plain: we should think, from the opinions above mentioned, conveyancers worse qualified than any other professors to give an opinion on the questions before us; they seem not merely in doubtful cases to espouse the cause of the revenue, for in that they do well, but to have recourse to very forced interpretations and analogies. Yet the true rule is, "a penal law shall not be extended by construction."[1]

II. *As to a Purchase for Administrators during the pendency of a suit for the Administration of the Estate.*

John Sinclair died in the month of March 1839 intestate, leaving five children his only next of kin, and letters of adminis-

[1] Dwarris on Stats. 737, 749.

tration were granted to his eldest son and one of his daughters. In December 1839 the administrators contracted to sell certain leasehold hereditaments, part of the estate of the intestate, to Thomas Green for the sum of 7000*l.* On account of some difficulties which arose in investigating the title, the completion of the purchase was delayed; and on the 24th of June 1840 a bill was filed by one of the children of the intestate against the administrators and the other children, charging, among other things, that a ship, part of the estate of the intestate, had been improperly sold to one of the administrators, and transferred into his name as the sole owner thereof, and praying that the estate of the intestate should be duly administered, and for an injunction to restrain the administrator who had purchased the ship from selling, transferring, mortgaging or in any manner disposing of the same; and an injunction issued accordingly. All difficulties respecting the assignment of the leasehold premises being removed, the administrators called upon the purchaser to take an assignment from themselves alone, and to pay the purchase money to them without the concurrence of the other next of kin. The purchaser, under the circumstances, doubted whether he could safely proceed to complete the purchase and pay over the money to the administrators without the concurrence of the other parties to the suit, but he was advised by a very able counsel at the chancery bar that the injunction extending only to prevent any further dealing with the ship in question, and not in other respects restraining the administrators from acting in the administration of the estate, they the administrators, notwithstanding the bill filed, had full power to execute the conveyance and receive the purchase money, and that they could compel the purchaser to complete the purchase and pay the purchase money to them. Counsel therefore thought that the purchaser could complete and pay over the money to the administrators with safety to himself. He observed, however, that he had known it questioned whether a sale could properly and securely be made by a trustee or executor after the filing of a bill for the administration of the estate; but that he himself did not think there was any ground for doubt in a case where there was nothing but the pendency of a suit. Sometimes, he observed, in such cases arrange-

ments are made for obtaining an order in the cause for the completion of the purchase and payment of the purchase money into court; and that an order of that kind might be obtained in the present case with the consent of the plaintiff, and that it would upon the whole be the best course for the purchaser, as giving him additional security against any chance of litigation in case of misapplication of the money.

III. *As to the Partition of an Estate with an Exception of the Coal Mines.*

A. B. being seised in fee of one undivided moiety of two estates, which we may call White Acre and Black Acre, by his will devised the same moiety to uses in strict settlement, with a power for trustees, in order to the making a specific partition or division of the estates, to revoke all and every or any of the uses limited, of or concerning his undivided share, and to limit and appoint such new and other uses as should be necessary or expedient for the making of such partition; and he did further declare, that the specific part of the estates which, upon every such partition as aforesaid, should be allotted for or result unto the said trustees, for or in lieu of the said undivided part or share thereinbefore devised, should immediately, after every such partition, be limited and assured to the uses of his will.

The owner of the other moiety of the estates was seised of his share in fee simple.

Both estates contained coal mines, and at the time of the testator's death the coal mines under each estate were under lease.

It will be necessary to state shortly the nature of a lease of coal mines. Such a lease contains, 1, a demise of the coal mines; and, 2, divers powers for working and carrying on the colliery: these powers are, shortly, to make pits, mines, watercourses, and other such works and conveniences, through, upon and within the lands or grounds under which the mines do lie, and to have sufficient ground or space upon the surface for depositing the produce of the mines, and for any other purpose of the colliery; and to form and make railways, or other ways or roads; and to get stones, and to make bricks for any purpose of the colliery; and to erect dwelling-houses, forges, and any other buildings necessary for the colliery. The lessor

usually reserves power to win and get iron-stone, and fireclay, for such minerals are often connected with seams of coal, and of course cannot be worked without disturbing the same. The lessor also reserves power to pass across any road or way made by the lessees, and also to form and make railways to intersect the railways of the lessees. The rents reserved are a certain rent to be paid whether coals are wrought or not, and for which the lessees are allowed to work a specified quantity; and if that quantity be exceeded, the excess is paid for at a certain rate. The lessees also make compensation for the damage or spoil of ground, but this compensation is not in general reserved in the shape of rent. Such is a brief description of a lease of coal mines in the counties of Northumberland and Durham.

Under these circumstances the trustees of the will and the owner of the other moiety agreed to make partition of the property, excepting the coal mines, and the question was, how this agreement should be carried into effect. The agreement was, that the trustees should have White Acre, and the owner of the other moiety should have Black Acre, in severalty, the coal mines excepted.

It was proposed that the trustees should first revoke all the uses of the will concerning the moiety devised both of White Acre and Black Acre, and then that they should appoint the moiety of both estates to the uses after limited and expressed; and that in like manner the owner should convey the moiety of both estates to the uses after limited and expressed, and that then should follow a limitation of White Acre to the uses of the settlement, and of Black Acre to the owner in fee.

But it was objected, and we think not without reason, that the particular power in the will did not authorise such a procedure; it was urged that the trustees had only power to revoke uses so far as might be necessary to make a partition, and that consequently the revocation of the uses of the will concerning White Acre was wholly unauthorized, because unnecessary. The trustees had already one undivided moiety of White Acre, and the object of the parties was only that the other undivided moiety should be united to it and limited to the same uses, and if this was done, the partition, so far as

regarded the settled estate, was complete; and on the other hand, the owner of the other moiety could only require that the undivided moiety of Black Acre, subject to the uses of the will, should be freed from those uses, and limited to himself in fee simple.

The exception of the coal mines, though apparently a simple matter, gave rise to a considerable complication and difficulty.

In order to effectuate this part of the agreement, it was necessary, that as well the coal mines as the rents and reservations of the leases should be excepted out of the appointment and conveyance, and that the assurance should be made subject to the powers granted to the lessees; but this was clearly not sufficient, for it was necessary to provide for the interests of the owners of the coal, when the leases should expire; it was therefore proper that sufficient powers should be reserved for the protection of the owners of the coal in that event. These powers were similar to those contained in the leases; but again, it was necessary to guard the interests of the owners of the surface, and to provide that they might work iron-stone and fireclay, and that they might pass across and intersect any road or way made by the owners of the coal or their lessees.

The owner in fee of one moiety of the estates desired that his divided share, viz. Black Acre, should be conveyed to uses to bar dower; and the draft stood thus: first, the trustees revoked the uses of the will concerning the testator's moiety of Black Acre, except and subject as after stated. By a second witnessing part the trustees appointed the undivided share devised by the will, of Black Acre, except and subject as after stated to the uses thereinafter declared concerning the same estate; by a third witnessing part, the owner in fee conveyed his moiety of both estates, except out of not only the appointment thereinbefore made, but also out of the grant and release thereinbefore contained, the several rents and reservations reserved by the two leases of the coal mines, and also except the coal mines and seams of coal within and under both the said estates. To hold the part or share thereby conveyed, except as aforesaid, and subject as well to the powers and authorities granted by the said recited indentures of lease as to the reservations thereinafter made to A. B. and his heirs to

the uses thereinafter declared. Then followed a declaration that White Acre should remain and be in severalty to the uses of the will, and that Black Acre should be to the uses of the appointment of A. B., and subject thereto to him in fee. It was then declared that the several powers and authorities next thereinafter specified were thereby reserved to the owners for the time being of the coal mines thereby excepted, and that the same were the reservations thereinbefore referred to. The powers were similar to those we have mentioned above to be usually comprised in leases of coal mines, with a proviso that the respective persons who should exercise the said powers should pay reasonable damage for spoil of ground, with a proviso that notwithstanding the exception and reservations thereinbefore contained, it should be lawful for the owner or owners for the time being of the respective lands or grounds under which the said excepted coal mines lay, to work iron-stone and fireclay, and to pass and repass over and across any road or way made by the owners of the coal, and to intersect the same roads or ways, or to form and make any other road or way over or under the same.

IV. *Operation of a Will on Property subject to a General Power of Appointment.*

By the Wills Act, 1 Vic. c. 26, s. 27, it is enacted that a general devise or bequest of real or personal estate shall be construed to include any real or personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. The language of this section applies only to real or personal estate which the testator may at the time of his will have power to appoint, but then the previous section, 24, extends it to all real and personal estate which may be subject to any such power at the time of the death of the testator, unless a contrary intention shall appear by the will.

A. B. made his will in August 1838, and thereby devised and bequeathed all real and personal estate of which as owner or in execution of any power or otherwise he should at the time of his decease be competent to dispose by that his will to trustees upon various trusts.

A. B., in November 1839, transferred stock into the names of two trustees, and a declaration of trust was executed, which declared that the same should be held upon such trusts as A. B. should at any time or times by any deed or deeds appoint; and until and in default of appointment, upon trust to pay the dividends and annual proceeds thereof to A. B. during his life, and after his decease the stock was to be held upon various trusts in favour of a natural child of A. B. and the issue of such child.

A. B. died in May 1840, and the question then arose whether the settlement of the stock was not in fact destroyed through the operation of the sections in the new Wills Act, which we have cited above, and according to the prevalent opinion it was, and we think the result would have been the same, if, instead of a general power to appoint, a settlement of the stock had contained a power to revoke and to make a new appointment; for there is no doubt under such a power A. B. might have appointed the stock to have been held in any way he thought proper. It must, however, be confessed that the expression "in any manner he may think proper" is ambiguous, and it may indeed be interpreted in three different ways: 1st. As to the mode in which the power is to be executed, whether by deed, will, or any other instrument; 2dly. As to the estates or interests which may be appointed;[1] and 3dly. As to the person who may be benefited; and it may be that a court will require, in order to satisfy the words of the s. 27 cited above, that the power of the testator shall be general as to all these three particulars; though no doubt the popular reading of the clause is in favour of it, meaning only that it should be general as to the persons to be benefited.

From this view of the new Wills Act, the practitioner may derive a useful caution; before the passing of that Act, if a client made any settlement or disposition of his estate, especially of real estate, it was the duty of the solicitor to advise that the will of the settlor should be looked at, lest some devise or bequest there contained should not be thereby unwittingly revoked. The old law as to wills passed too little; the new, it may be thought, in the instance to which we now advert,

[1] In many cases the word "manner" has been insisted upon for this purpose, see 1 Sug. on Powers, 505, et seq.

passes too much. Therefore, after any voluntary settlement made by a testator which reserves any power to the settlor, a codicil should be made or a clause inserted in his will, to protect the power reserved from being unintentionally exercised.

Perhaps it would have been well if in s. 27, cited above, we had read not only "unless a contrary intention should appear by the will," but also, "or by the instrument creating the power."

We will now give the form of a codicil which may be used in the case to which we have referred :—

This is a codicil to and to be taken as part of my last will and testament, made the day of , which I hereby republish; but I expressly declare that the devises and bequests therein contained shall not be deemed or construed to comprise any real or personal estate which I am now or shall at any time hereafter be only able to dispose of through the medium of a power created or reserved by myself. In witness whereof I have hereunto set my hand this day of in the year .

It will however be advisable in drawing settlements in which the settlor reserves a power to appoint the premises, so to frame such power as to give the settlor a sufficient range and yet to qualify it in such a manner as to exempt it from the operation of the enactment in the Wills Act which we have cited above. This may be done by adding to the power some such words as the following: "so only that every such appointment be made in favour of a person or persons domiciled or born in the united kingdom of Great Britain and Ireland, and so only that no estate tail be thereby created or limited;" this would, we think, prevent the settlement being unwittingly destroyed by a general devise contained in the will of the settlor.

W. C. W.

ART. V.—GUARANTEE.

A GUARANTEE is defined to be a promise or undertaking to be answerable for the debt or default of a third person.[1] We take up the term, however, in the more extended and popular sense which this species of contract has derived from the 4th sect. of the statute of frauds, for the purpose of presenting, at once, a practical exposition of that important branch of the statute, and a view of the general principles applicable to the relation of principal and surety.

The statute alluded to, enacts *(inter alia)*, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Before proceeding to notice the application and construction of this enactment, it is necessary to remark, that it makes no alteration in the common law further than to require written, instead of parol *evidence* of the engagement, and that all which was necessary at common law to render that engagement valid and obligatory is still necessary. Hence, a contract of guarantee, like any other contract not under seal, must be founded on a good consideration. There must be a *quid pro quo*—the inducement must be such as either does in fact occasion, or may reasonably be expected to occasion a detriment to the party to whom, or a benefit to the one on behalf of, or by whom the guarantee is given. Hence, a mere naked promise by a husband to pay a debt contracted by his wife, *dum sola*, or by an executor to pay a debt due from the testator, does not change the nature of the debt, and is of no avail to charge the one or the other personally.[2] The usual consideration for a guarantee when given for a pre-existing debt, is that of forbearance to sue; but a pecuniary consideration to the guarantor will suffice. And so that the consider-

[1] Tomlins' Law Dictionary, by Grainger.

[2] See Mitchinson v. Hewson, 7 T. R. 348; Rann v. Hughes, id. 350.

ation be one which is or may be to any person, and under any circumstances of any value at all, the Court will not inquire into its adequacy. It is immaterial whether the forbearance be for one day or one year. In a recent case, a guarantee was given to cover both a pre-existing and a future debt, in consideration of a sum of 2*s.* 6*d.* paid to the guarantor, and the Court held it good.[1] And where the defendant, in consideration that the plaintiff would give up to him a guarantee which he had previously consented to for a third party, promised to see certain bills accepted by that party in favour of the plaintiff duly paid; it was holden no objection that the guarantee so given up was void by reason of its not complying with the requisitions of the statute[2].

Having premised these few observations, we propose to consider, in the first place, to what contracts the statute applies; secondly, the form and construction of a guarantee; and, thirdly, by what means, irrespective of payment, a guarantee may be vacated or discharged.

1. The statute clearly contemplates three persons standing in different relations,—a creditor, a debtor, and a surety; for it speaks of the latter as a defendant, answerable for the "debt, default or miscarriage" of another person, who must, therefore, be a person distinct from the plaintiff. This consideration enables one to distinguish readily between a contract of *guarantee*, and a contract of *indemnity*. The latter has in view the security of the other contracting party against a positive loss, by re-imbursing him what he may have to pay; the former engages to pay what may be due to him from a third person. Thus, in Howes v. Martin,[3] the plaintiff, who had accepted a bill for the accommodation of the defendant, and who upon being sued thereon, had, at the request of the defendant, resisted the action, was holden entitled to recover what he had been obliged to pay for the costs of the action as well as the debt, although he had no note in writing. This distinction was fully established in Adams v. Dansey.[4] The plaintiff and another person having been sued by the vicar for tithes, in consequence of a claim to a

[1] Dutchman v. Tooth, 5 B. N. C. 577.
[2] Brooks v. Haigh, in Error, 10 Ad. & El. 323.
[3] 1 Esp. 162. [4] 6 Bing. 507.

modus set up by them and the other landowners of the parish, the defendant, who was one of the landowners, had verbally agreed to indemnify him against all expenses, upon being allowed to carry on the defence in the plaintiff's name. This was done, and a decree having been given against the plaintiff, he was holden entitled to re-imbursement for the costs against the defendant. The case of Winckworth v. Mills[1] appears at variance with these decisions. There the plaintiff, the holder of a promissory note, had been induced by the defendant, who was an intermediate indorser, to sue the makers upon a promise by the defendant to indemnify him. The action was brought both for the amount of the note and the costs of the action, and Lord Kenyon ruled that the latter could not be recovered, because the promise was not in writing. It is difficult to perceive any distinction between this and the former cases, which should call for a different decision. The costs of the action were costs which the plaintiffs were primarily liable to pay to their attorney, and the defendant became surety in respect of them, not for the third party, the drawer, but the plaintiff himself; had the defendant paid them, he could not have come upon the drawer for re-imbursement. The plaintiff's counsel, it is said, were dissatisfied with the ruling, but upon his Lordship offering to save the point, they declined it.

Again, the engagement to come within the statute must be a collateral, or secondary one, for the performance of something which the third party is also bound to do. With reference to this point, the cases present some very nice distinctions, but they may conveniently be divided into two classes.

1st. In the case of an executory consideration, where no credit is given, or intended to be given to the third party. As where A. orders B. to supply C. with goods on his, A.'s account. Here, although C. has the benefit of the contract, yet, as by its very terms B. is not to look to C. for the money, the engagement of A. is direct, or original, as it is sometimes termed by way of distinction, and, therefore, A. is bound without a promise in writing. Upon this point it is to be observed, that where the words used import of themselves

[1] 2 Esp. 485.

a secondary liability, as where the party says: "If you will supply goods to A. B. I will *see you* paid;" or, "I will *guarantee* you the payment of any goods you may supply to A. B.," the case is *primâ facie* within the statute; but if they import a primary engagement, as "I will *pay* you for any goods you may supply to A. B.," the contract is *primâ facie* a direct or original one. Yet, in such a case, evidence is admissible to explain the meaning of the parties, and if the contract be not in writing, it becomes, in all cases, a question for the jury, whether any credit was given to the third party or not.[1] In Taylor v. Hilary[2] the agreement was, that the plaintiff should supply goods to H., and that the same should be paid for by bill at four months, to be *accepted* by the defendant, and this was holden to be clearly an original contract.

It seems to have been the opinion of Lord Ellenborough, that an attorney who had commenced the defence of an action for the defendant, could not recover the costs of proceeding therein from a third party, though the latter (one of the defendant's bail) had expressly authorized such proceeding, on his account, and after the attorney had refused to go on, on the credit of the defendant, because the authority of the bail was not in writing.[3] In a later case, however, Tindal, C. J., ruled that a third party might, by taking up the defence at a given point, become liable for the subsequent costs without a note in writing. There the defendant had, pending the action, assigned over his effects for the benefit of his creditors, and the trustees who had, by parol, authorized the attorney to proceed with the defence, were holden responsible for all the costs subsequently incurred.[5]

2dly. Where the engagement is for payment of a precedent debt, or discharge of a precedent liability, if its object or effect be to exonerate the party originally liable, it is not within the statute. The case of Goodman v. Chase[4] affords a striking illustration of this point. The plaintiff had recovered judgment against the third party, and taken him in execution, when the defendant entered into an agreement with the plaintiff that

[1] See Matson v. Wharam, 2 T. R. 80; Rains v. Storry, 3 C. & P. 130; Anderson v. Huymen, 1 H. Bl. 120.

[2] 1 C. M. & R. 741.

[3] Barber v. Fox, 1 Stark. 270.

[4] Becke v. Penn, 7 C. & P. 397.

[5] 1 B. & A. 297.

he would, in consideration of his letting the debtor go at large, deliver him into the sheriff's custody again at the expiration of eight days, and, in default of so doing, pay the debt and costs for which the execution had issued. It was holden, that as by the discharge of the debtor from execution the debt as between him and the plaintiff was satisfied, the agreement of the defendant was original and direct, and therefore valid without being in conformity with the statute. Upon the principle of this case, a promise by a third party to *pay* a debt due from another in consideration of the creditor giving the debtor a receipt for the amount, or otherwise discharging him from the debt, must be considered not within the statute.

The case of Williams v. Leper[1] stands at the head of another class of decisions which seem referable to the same principle. There one Taylor, a tenant of the plaintiff, being in arrear for three quarters rent, and insolvent, had conveyed all his effects for the benefit of his creditors. The defendant, an auctioneer, was employed to sell them. Previously to the sale the plaintiff came to distrain, upon which the defendant promised to pay the arrears, provided the plaintiff would desist from distraining and thus suffer the sale to proceed. "This case," said Lord Mansfield, "has nothing to do with the Statute of Frauds. The landlord had a legal pledge; he entered to distrain; he had the pledge in his custody. The goods were the fund; the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was the trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien." The fact that in this case the defendant was to pay the money not out of his own pocket but out of the proceeds of the goods, although one which, as we shall presently see, would of itself take the case out of the statute, does not appear to be an essential ingredient in cases of this description. It is the giving up at the defendant's instance of a security which the plaintiff held, and out of which he would have realized payment of his debt; a transaction which may not unreasonably be compared to the transfer of a mortgage, and the effect of which would be, as it seems, to discharge the original debtor altogether. In Castling v. Aubert[2] the plaintiff, who was the holder of certain policies of assurance belonging to

[1] 3 Burr. 1886. [2] 2 Ea. 325.

a third party, and upon which he claimed a lien for the amount of some outstanding bills which he had accepted for the accommodation of the assured, was prevailed upon by the defendant, to whom the assured had transferred the management of his business, to give up the policies to him upon his undertaking to indemnify the plaintiff against his acceptances and the costs of certain actions which had been brought against him on some of the bills. The undertaking was not in writing, and the Court of Queen's Bench held that it need not be so. In these and in the subsequent case of Bampton v. Paulin,[1] the circumstances of which were similar to those of Williams v. Leper, the money was to come out of a fund belonging to the original debtor, and not out of the pocket of the defendant. To show that this is not material, the case of Houlditch v. Milne[2] may be cited. The defendant in that case had sent certain carriages belonging to a third party to the plaintiff to be repaired. One of them had been purchased of him by the owner and paid for. The bill was for repairs done to this carriage and was made out in the owner's name. The plaintiff had let go the carriages upon a promise by the defendant to pay the bill, and Lord Eldon, C. J. ruled that on this account the undertaking was not within the statute. In Anstey v. Marden,[3] a parol undertaking by a third party to pay a composition of 10*s.* in the pound on another's debt, in consideration of the debtor being discharged, was holden valid.[4] And in the later case of Maggs v. Ames,[5] it was laid down as the opinion of the Court of Common Pleas, that if a creditor discharge his debtor from an arrest on *mesne* process upon a primary and absolute undertaking by another to pay the debt or accept a bill for the amount, the latter is liable without regard to the statute.

The words "to answer for the debt, &c. of another person" require more specific notice before we proceed to the other branches of the subject.

"To answer for," means to pay, and to pay out of the party's own pocket. And to satisfy the other words of the paragraph just quoted, the engagement must refer to a debt,

[1] 4 Bing. 264. [2] 3 Esp. 36. [3] 1 N. R. 124.
[4] See also Bird v. Gammon, 3 B. N. C. 883. [5] 4 Bing. 470.

&c. which some other person will be at the same time liable to pay. Hence, an undertaking to procure a third party to execute a guarantee is not required to be in writing, although the effect is to throw on the party making it as great a responsibility as if he had given a guarantee himself.[1] Nor is a promise that such third party, supposing that he is the guarantor and has not entered into a valid undertaking, shall pay, for this is equally out of the statute. But a promise that a surety who has given a valid guarantee shall pay, is as much within the statute as a guarantee for the original debtor. In the one case it is for the "debt;" in the other for the "default" of another person.

So an undertaking that another who is a debtor "shall pay" the debt is clearly within the statute, though it does not profess to engage for a payment by the party himself. And a promise to accept, or to draw, or indorse a bill for the debtor, or to do any other act which would, if done, impose a legal obligation to pay in certain events, must be in writing. It was doubted by Abbott, C. J. in Jarmain v. Algar,[2] whether a verbal undertaking to execute a bail bond for another was not valid, but inasmuch as the doing so would make the party, in the event of the debtor absconding, &c. liable for the debt, the case seems as much within the statute as a promise to pay in that event.

But though the undertaking be to pay, if it be not to pay out of the party's own funds, the statute does not apply. Thus, where A. had employed B., a carpenter, to do some work, and for the purpose of enabling him to have the necessary supply of timber promised C. that he would pay for it out of the money which he would have to pay B. when the work were done, the Court of Common Pleas held that this promise was not required to be in writing.[3] So where A., being indebted to B., assigned to him a debt due from C. to him in discharge of his liability, and C. promised B. to pay him, this promise was holden not within the statute.[4] The agreement in these cases operates as an equitable assignment

[1] Busbel v. Beavan, 1 B. N. C. 103.

[2] 2 Car. & P. 249.

[3] Dixon v. Hatfield, 2 Bing. 439; see also Andrews v. Smith, 2 C. M. & R. 627.

[4] Lacy v. McNeile, 4 D. & R. 7.

of the funds out of which the payment is to be made, and it is clearly immaterial whether the party making it has at that time any funds in his hands or not. The only question is, whether the payment is to be made out of them or not.[1] The case of Morley v. Boothby[2] appears to stand in opposition to this doctrine. There the defendants undertook, in consideration that the plaintiffs would supply a third party with goods to be used in the erection of a church, and would take his acceptance for the price, that the bill should be paid out of monies to be received by them on account of the said church. The question however arose on demurrer, and the only point raised in the pleadings was, whether the written document which the defendants had given sufficiently expressed the consideration so as to satisfy the statute, both parties assuming the case to be within it.

It was once considered that the statute contemplated only an engagement to answer for the contract of another, and until the case of Kirkham v. Marter[3] the word "miscarriage" seems to have been allowed no distinctive meaning. For although in Read v. Nash[4] a promise by a third person to pay a sum of money as damages, in case the plaintiff in an action of trespass would withdraw his record, was holden good without writing; the judgment proceeded on the ground that the defendant in the original action was not a debtor and never liable to the particular debt, damages, or costs. In the case referred to, the declaration stated that one T. M. had, without the plaintiff's leave, wrongfully ridden his horse, in consequence whereof the horse died; that the plaintiff had threatened to sue T. M. for damages, when the defendant, in consideration that he would not do so, agreed to pay the value of the horse. It was objected that this agreement should have been in writing, and the Court so held. The word "miscarriage," said Abbott, C. J., "has not the same meaning as the word 'debt,' or 'default.' It seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible." And Hol-

[1] See Andrews v. Smith, 2 C. M. & R. 627; Hodgson v. Anderson, 3 B. & C. 842.

[2] 3 Bing. 107. [3] 2 B. & A. 613. [4] 1 Wils. 305.

royd, J. observed, " I think that both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract."

We come now to consider what it is which the statute requires in order to bind the party by a promise falling within its scope and meaning.

The enactment is, that no such promise shall be good unless " the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." It is clear that the statute does not require the written document to be drawn up at the time the contract is made; nor that it be an agreement *inter partes;* nor that it be signed by the person in whose favour it is made. It has accordingly been ruled, that a letter written by a guarantor to a third person informing him of the agreement the writer had entered into, was available to satisfy the statute on behalf of the creditor, though it was never intended to be seen by him.[1] So if there has been a correspondence between the parties on the subject, and the argument can be plainly collected from the whole of the letters put together, it will suffice.[2] Nor is it necessary that the instrument should be directed to the creditor, or that his name should appear in it.[3] " A guarantee," said Parke, J., in Shortrede v. Cheek,[4] " is to receive its application from the state of facts as shown in evidence." It is enough that there is some writing authorized by and bearing the name of the guarantor, which specifies what he has undertaken to do and what was the consideration for his undertaking. All beyond this may be supplied by parol evidence. Hence, a guarantee addressed to one of two partners, undertaking for the loan of money which was to be and was in fact made by the firm, must be sued on by all the partners.[5] And where, upon an appli-

[1] Longfellow v. Williams, Peake's Ad. Ca. 225.

[2] Coe v. Duffield, 7 Moore, 252.

[3] Walter v. Dodson, 3 C. & P. 162.

[4] 1 Ad. & Ell. 59.

[5] Garrett v. Handley, 3 B. & C. 462; Garrett and others v. Handley, 4 B. & C. 664.

cation by an attorney for a debt, a third person wrote on behalf of the debtor asking for time, and promising, in consideration of the time being given, to pay *him*, the attorney, the debt and costs, it was holden that the guarantee was available to the creditor and that he was the proper party to sue upon it.[1]

But the instrument must on the face of it contain all the ingredients of a binding and valid contract. It must therefore express not only the undertaking or promise, but also the consideration for it, both being holden to be comprised in the word "agreement." This is the ground upon which the decisions establishing the doctrine proceeded. It is worth remarking, however, that it was the opinion of an eminent judge, that had the statute merely directed the "promise" to be in writing, the result would have been the same. "If the contract," said he,[2] "was oral, the benefit or inconvenience, as well as the other parts of the contract, could only be proved by parol testimony. When the contract was reduced to writing, it was required not only that the obligatory part, but that the inducement or consideration should also be in writing, because it was always a rule in the law of evidence, that no parol testimony could be admitted either to supply the defects or explain the contents of a written instrument. If the writing did not prove the consideration, it could not be proved in any other manner, and thus the contract failed, because the consideration, without which it was altogether inoperative, could not be shown. When the Statute of Frauds declared that no person should be charged with the debt of another except on an agreement in writing; if the clause in the statute had not expressed (as I think it does) that the *whole* agreement should be in writing, the law of evidence would have rendered it necessary that the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parol testimony."

This reasoning is supported by the case of Lees v. Whitcomb.[3] There the declaration charged, that in consideration the plaintiff, at defendant's request, would receive the defen-

[1] Bateman v. Phillips, 15 East, 272.

[2] Best, C. J. in Morley v. Boothly, 3 Bing. 112.

[3] 5 Bing. 34.

dant into her service, and cause her to be taught the business of a dress-maker, the defendant agreed to remain for two years, for the purpose of learning the trade. The defendant, it appeared, had signed a written instrument, whereby she had agreed in the terms stated, but because this instrument did not contain the agreement on the plaintiff's part to teach, the action failed.

The consideration, therefore, must appear on the face of the instrument, not indeed in express terms, but in such a way as to leave no doubt what the consideration was. A guarantee in these words, "Sir, as you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount in six weeks," was holden void, as affording no implication that forbearance to sue the brother was, as it was alleged in the declaration, the inducement. "The consideration need not," said Patteson, J., in delivering the judgment to the Court, "be stated in express words; it may be collected or implied from the instrument itself; but then it must be collected not as matter of conjecture, but with certainty.[1]"

The same objection was taken to a guarantee in the following form, "Gentlemen, inclosed I forward you the bills drawn per J. T. Armstrong, upon and accepted by Leonard Dell, which I doubt not will meet due honour; but in default thereof, I will see the same paid." In this case also the alleged consideration was forbearance, and it was proved that Armstrong and Dell were previously indebted to the plaintiff in an amount exactly corresponding with the amount for which the bills were drawn. The opinion of the Court, so far as it relates to the point in question, is worth recording at length. "It would undoubtedly be sufficient in any case if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such and no other, was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute. But there must be a well-grounded inference, to be necessarily collected from the terms of the memo-

[1] James v. Williams, 5 B. & Ad. 1109.

randum, that the consideration stated in the declaration and no other than such consideration was intended by the parties to be the ground of the promise. Now looking at the memorandum in this case, and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion, that giving time and forbearance to sue, was necessarily the consideration for the promise of the defendant. It may have been so, undoubtedly, and most probably it was. But it may also have been, for any thing to the contrary to be collected from the written agreement, an engagement on the part of the plaintiffs to extend their credit to Armstrong and Dell, or an engagement by the plaintiffs to discount the bills for Armstrong and Dell. For there is nothing whatever in the letter itself that necessarily connects the undertaking of the defendant with the consideration of forbearance; no expression to denote that the bills are delivered in satisfaction of or as security for the debt then due from Armstrong and Dell to the plaintiffs; not even any mention that any debt was due to them. Undoubtedly it is extremely probable, from the amount of the debt due from Armstrong and Dell agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and if so, the forbearance for the time the bills had to run, must have formed the ground for the promise of the defendant, but there is no *written evidence* to show that such was the case; and after proof of the existence of such debt by parol evidence (which might be admitted), the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, namely, that the forbearance of suing for that debt was the consideration for the particular promise."[1]

To this may be added the words of Lord Lyndhurst, C. B. with reference to a paper entitled in an action between Ridley and Ashdown, and containing the following undertaking: "We jointly and severally undertake and agree to pay George Cole, Gent. the debt and full costs in this action, provided on or before the 1st day of January 1831 a sum of 11*l.* 10*s.* 3*d.* be not paid to him the said George Cole, at his office, as the attorney for the plaintiff." "On looking at this instrument,"

[1] Hawes v. Armstrong, 1 B. N. C. 761.

said his lordship, "various interpretations might be put upon its language and several considerations without much ingenuity conjectured. It appears to me, that if in such a written agreement to be answerable for the debt of another person, two distinct considerations may with equal propriety be inferred as the inducement for that engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action."[1]

In the following case, the consideration was deemed sufficiently expressed:—"Major N. being again disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I enclose you his acceptance payable here at two months. You may put your name as drawer, and safely pay it away." Major N., it was proved, had been pressed by the plaintiff for payment, and the latter on receipt of the above letter called on the writer, who was N.'s attorney, and told him he would not take the bill without his indorsement, whereupon the attorney wrote on the back of the above letter, "I never put my name to bills, but I will see it paid for Major N." The indorsement, coupled with the letter, was holden to amount to this: "In consideration of your forbearing to sue Major N. for two months, I will pay the bill if he fails to do so."[2]

So a guarantee in these words, "I hereby guarantee the present account of Miss Harriet Moseley due to R. S. & Co of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th September next," was holden good as importing a consideration of further credit.[3]

The essential element of every contract is of course the consent of all the contracting parties. Hence if the instrument purports on the face of it to be a proposal, or if it appears in evidence to have been intended and understood by both merely as such, the fact of acceptance and notification thereof must be proved. For want of such proof the following letter was holden insufficient: "Gentlemen, as I understand Messrs. A. & Co. have given you an order for rigging, &c. which will amount to about 4000*l.*, I can assure you from what I know of A.'s honour and probity, you will be perfectly safe in cre-

[1] Cole v. Dyer, 1 C. & J. 461.
[2] Emmet v. Kearns, 5 B. & C. 559.
[3] Russell v. Moseley, 3 B. & B. 211.

diting them to that amount. *Indeed I have no objection to guarantee you against any loss from giving them credit.*" [1]

There seems no doubt that such acceptance, constituting as it does a material part of the contract, must also be notified in writing. The cases just cited did not call for any opinion on this point, but in a similar case Lord Ellenborough expressly ruled that a verbal acceptance would not be sufficient.[2] On the other hand, where the promise is as to part within the statute, but not as to the residue, it is void *in toto* if not in writing. Thus where the defendant, an auctioneer, being about to sell the effects of the debtor, verbally promised the debtor's landlord that if he would forbear to distrain for the arrears then due, he, the defendant, would pay the rent up to the following Michaelmas; it was holden that the landlord could not recover even the arrears, on the ground that as to the accruing rent, the promise was within the statute, and that being void in part it was void altogether.[3]

So in Clancy v. Piggott,[4] an agreement to pay the plaintiff a sum of 50*l.* which was due to him from a third person, in consideration of his giving up goods in his possession belonging to that person of the value of 20*l.*, was holden void for not being in writing. There is an evident distinction between these cases and the case of Wood v. Benson.[5] The latter proceeded on a guarantee in these words, "I do hereby engage to pay the directors of the Manchester Gas Works for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre during the time it is occupied by my brother-in-law Mr. R., and I do also engage to pay for all arrears which may be now due." The former transaction was deemed an original contract, and therefore the plaintiff recovered for the subsequent supply, though he failed as to the arrears for want of an apparent consideration.

The next subject of consideration is the signature, which may be made either by the party himself, or by any person *thereunto* authorized by him.

It is immaterial in what part of the document the signature

[1] M'Iver v. Richardson, 1 M. & S. 557. See also Mozley v. Tinkler, 1 C. M. & R. 693.

[2] Grant v. Hill, 1 Stark. 10.

[3] Thomas v. Williams, 10 B. & C. 664.

[4] 2 Ad. & El. 473.

[5] 2 C. & J. 94.

is put; whether the party begins "I, A. B. do undertake," &c., or whether he puts his name at the foot. It is equally immaterial whether the name be written at length, or whether the initials only be used; whether it be stamped, or written with ink, or with a pencil.[1]

Any third person may be appointed agent for the purpose of signing the name, and such appointment need not be in writing. The question of agency is of course one for the jury, and the burden of proof rests on the adverse party. Where the guarantee had been signed by the defendant's son, who was a minor, proof that he had in several instances accepted bills for his father and by his direction, was holden evidence of his authority upon which the jury might find a verdict for the plaintiff.[2]

It has been decided in two cases on the 17th section of the statute, the language of which with reference to this point is the same as that of the 4th section, that the agent contemplated by the legislature must be some third person, and it was laid down that the other contracting party cannot act in that capacity so as bind the guarantor.[3] In neither was there any express authority to the other party so to act. In the one the defendant stood by while the plaintiff noted down the contract and suggested some alteration in the figures. The other was an action by an auctioneer for the price of goods sold by him, and the only writing was the entry by him of the defendant's name, &c. in his sale book. The Court were of opinion that had the action been brought by the principal, the signature of the auctioneer would have been sufficient to bind the defendant, but not where he assumed the character of both principal and agent. Neither case, therefore, shows, nor is there anything in the language of the statute to show, that a signature by the other party at the express request of the guarantor would not be good.

We are compelled, by the want of space, to reserve the remainder of the article for our next number.

L.

[1] See Saunderson v. Jackson, 2 B. & P. 238.

[2] Watkins v. Vince, 2 Stark. 368.

[3] Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 B. & A. 333.

ART. VI.—THE DOMINION OF THE SEAS.

It is a general principle that one independent state, during time of peace, is not entitled to limit the commerce which another country may think fit to carry on, either with the natives of a third state or among its own subjects,[1] unless the right has been acquired by treaty.[2] This position, however, is not to be understood as authorizing one nation to trade with the colonies of another, even though the nations may be at peace with each other.[3] In pursuance of this duty to permit foreign commerce, which is incumbent upon nations at peace, every such state is bound to grant a passage for foreign merchandize through its dominions, provided no detriment or inconvenience arise to herself from such freedom of passage;[4] and she cannot lawfully annex burdensome or unreasonable conditions to the grant. But if any apprehension of danger arise from it, she has a right to require sureties, or if the passage occasion any expense in canals or highways, she may exact a reasonable toll on that account.[5]

Things, of which the use is inexhaustible, such as the sea and running waters, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use.* Thus the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one state through the territory of another into the sea, or into the territory of a third state. The right of navigating for commercial purposes a river which flows through

[1] Vattel, lib. ii. c. 2, s. 24; De Martens, lib. iv. c. 3, s. 140; 8 Term Rep. 437, 568.

[2] Puffendorf, lib. iv. c. 5, s. 10; Salonici v. Johnson, Park's Insur. 498.

[3] Montesquieu, Esprit des Lois, lib. xxi. c. 21; 2 Robinson, 198.

[4] Numbers, xx. 17—21.

[5] Vat. Prel. s. 14, lib. ii. c. 8, s. 100, c. 10, ss. 132, 134, lib. i. c. 9, ss. 103, 104; Grotius, lib. ii. c. 2, s. 13; Puff. lib. iii. c. 3, ss. 5, 7.

he territories of different states, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.[1]

Upon this subject Puffendorf adds:—"Truly speaking the law of humanity does not seem to oblige us to grant a passage to any other goods except such as are absolutely necessary for the support of their life, to whom they are thus conveyed. But as for those who import such commodities as improve and encourage luxury, or from which those who deal n them do not seek any supply of real wants, but rather an excessive gain and an assistance to covetous desires, I do not see what right they have to demand passage through our coasts for this kind of traffic, or upon what pretensions they can claim such a privilege as their due. I confess there scarcely appears any probable cause for denying unarmed vessels the liberty of an open sea, of which we are masters, whilst they are trading with a third nation with whom we are at peace; and to this point chiefly relate all those authorities and testimonies of authors, usually produced in the main dispute. But thus much we may reasonably do: we may stop the vessels in such a case, and force them to leave their cargo in our territories, that we may have the benefit of purchase. For besides that the frequent passage of strangers may create danger, or at least excite suspicion in our state, what should hinder us from deriving that profit to our own people, which would otherwise be made by foreigners; since in matters of favour we ought always to prefer the former to the latter? And though in strictness it be indeed no damage to us, if we permit the free transportation of those commodities, and though the third party who receives them does not properly injure us by making a gain which it was in our power to have secured before him, yet since he has no right of excluding us from such a gain, why ought we not to love ourselves best, and to be beforehand with him in the advantage, as we shall

[1] Grot. l. ii. c. 1, ss. 12—14, c. 3, ss. 7—12; Vattel, lib. ii. c. 9, ss. 126—130, c. 10, ss. 132—134; Puf. lib. iii. c. 3, ss. 3—6.

be, if, while we lie thus in the midst between two nations, we take care not to let such goods pass from one to the other without first going through our own hands? And unless this be admitted for fair and equitable dealing, I see not on what grounds we can defend those staples and other rights which we find in some countries, by virtue of which foreign commodities are stopped, and carried to the public place of sale, and strangers are permitted to traffic not immediately between themselves, but at second-hand with the natural subjects."[1]

This law of land-passage applies only to inland nations, which are few, the commerce of the world having in these latter days been carried on principally by sea; but the still more modern discovery of steam-locomotion, and its applicability to railroads, may perhaps restore the commerce of Europe with the East (at least as far as relates to passengers and letters) to its ancient channels, and thus bring the rights of land-transit, from one country to another through a third, again into question.

It must not be inferred from the above quotation that Puffendorf maintains the affirmative of the question, whether a nation has a right to the dominion of the open or main seas. This right has certainly long been claimed, perhaps enjoyed, by Great Britain, whose prescriptive title thereto has been asserted by Selden in his "Mare Clausum, seu de Dominio Maris." This work was evidently suggested by the "Mare Liberum" of Grotius, which was published in the year 1609, in order to establish the right of the Dutch to navigate to the East Indies in opposition to the exclusive claim of the Portuguese.

In the first part of this work (says the biographer of Selden) the author lays his foundation deep in disquisitions as to the nature of right and dominion, and then proceeds to give examples of maritime dominion asserted and exercised by different nations in ancient and modern history. In several of these, however, he will probably appear to have confounded naval power with maritime dominion, especially in the instances of the Greek states which are said θαλασσοκρατειν, which word, as he acknowledges, often means no more than to possess a superiority by sea; and in point of fact the do-

[1] Puf. lib. iii. c. 3, s. 6.

minion of the sea, historically considered, will be found to import no more than the power, alternately possessed by different states, of ruling in the portions of sea adjacent to their own coasts, and dictating to their neighbours such conditions of navigating as they thought expedient. In this view there are abundant instances of the assertion of such a dominion, which has been acquiesced in only so long as it was supported by a powerful navy.

The second part, in which British maritime dominion is attempted to be established, begins with a quadripartite division of the British seas, according to to the four cardinal points, and proceeds to show the right of sovereignty exercised in all these at different periods. A dominion over these parts of the surrounding ocean is traced from hand to hand, in the Roman, Saxon and Norman times, as accompanying the several changes in territorial power. The office and jurisdiction of admiral of England are deduced from ancient diplomas; and arguments are brought to prove that the admirals of the opposite coast of France did not pretend to the same authority in the Channel as those of England. The permission of transit and fishery granted by the English kings at different periods to strangers is adduced as a cogent proof of the British sovereignty in these seas; which is confirmed by the rules and limits assigned in them to foreigners, at war with each other, but mutually in amity with England. The assumption or incidental mention of this maritime dominion of our kings in their charters and public records, and its recognition in our law books, are adverted to, as additional testimonies of the existence of such a claim; and the claim is regarded as acquiesced in by foreign nations, in the ancient and established custom of striking sail to English ships of war in the surrounding waters.

After the production of further proofs of a similar kind, he concludes: "And true it is, according to the mass of testimony above adduced, that the very shores and harbours of the neighbouring transmarine provinces are the southern and eastern bounds of the British maritime empire, but that in the vast and open northern and western ocean, they are to be fixed beyond those wide-spreading seas, which are occupied by England, Scotland and Ireland."

In such a controversy (adds Dr. Aikin) the philosopher will perhaps find that precedents have been made to serve instead of principles, and that acts of power have been represented as assertions of right; the jurist will be unwilling to admit into the code of national law any article that militates against the fundamental principle of equality and reciprocity between nations, while the politician will be inclined to smile at the importance attached to argumentative justifications of claims, which can never be made good in practice but by such a preponderance of force as would give them effect without any argument. It is certain that the more able Great Britain has become to assert her maritime empire by force of arms, the less solicitous she has been to avail herself of supposed rights, derived from remote antiquity, which (if disputed) could not be established without compulsory means.[1]

We find two other writers, of course of our own country, justifying the dominion or sovereignty of the British seas;[2] but the more philosophical opinion is clearly that of Grotius, Bynkershoek, Puffendorf, and Vattel.

Grotius admits no more than the possibility of appropriating the waters immediately contiguous to the land or to the ship, "qui maritimus est exercitus," always confining his view to the effects of the neighbouring land, or present ship, in giving a sovereignty over "pars" or "portio maris."[3]

Bynkershoek admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas, on the ground of the want of uninterrupted possession.[4]

Puffendorf lays it down, that in a narrow sea this dominion belongs to the sovereign of the surrounding land, and regulates the distribution of it, where there are several such sovereigns, by the same rules which are applicable to neighbouring proprietors upon a lake or river, supposing that no compact has been made in favour of one by the rest.[5]

Vattel says, that no nation has a right to appropriate to

[1] Aikin's Life of Selden, pp. 92—96.

[2] Molloy de Jure Marit. et Naval. b. i. c. 5; Sir John Boroughs on the Sovereignty of the British Seas.

[3] Grot. lib. ii. c. 3, ss. 8—13.

[4] De Dominio Maris, dissert. v. 1702.

[5] Puf. lib. iv. c. 5, ss. 6—10.

itself the use of the open sea, the rights of navigation and fishing there being common to all; and that a single nation, which should arrogate to itself an exclusive right to the sea, and support its pretensions by force, would do an injury to all nations, which they are justified in combining to repress. A nation may, however, acquire exclusive rights of navigation and fishing by treaties, but not by prescription and long use, except by virtue of a tacit agreement. He takes a distinction between the *empire* of the sea and the *domain* or property of it;[1] but still it may be fairly asked whether, from the nature of the subject, the *empire* of what are called the British seas be not all the *property* that can be enjoyed of them?"

"And upon the whole, (says Locke) I am forced to confess that, considering the extent of what are called by Selden and Molloy the British seas, and notwithstanding the treaties between the nations of Europe, in which the British maritime supremacy has been acknowledged, and that extent recognized, and which constitute our most legitimate title to such empire, it is nothing but our superior naval force which insures us the continuance of what, by the natural law of nations, we have no right to arrogate. It may not, perhaps, lie in the mouth of the actual parties to these treaties to declare war against an ascendancy which they have acknowledged; and, as a subject of Great Britain, I should be sorry to see the day when another nation had acquired a naval force sufficiently powerful to dictate to us the abrogation of treaties, which it may have entered into, in compromise of its own rights by the natural law of nations; but holding, as it becomes a student of them, the universal law of nations in paramount respect, I think it incumbent upon me to say that, with regard to those nations who may not, or the posterity of those who may,[2] have acknowledged by treaty or tacit agreement the dominion of the British seas, it behoves Britannia to "bear her faculties meekly," and always to keep in mind, that however she may talk of acquiring by prescription and treaty, she evidently retains only by force of arms; but those arguments need not be strictly logical, which are backed by a fleet of British ships of war."

[1] Vat. lib. i. c. 23, s. 295. And see Grot. lib. ii. c. 3, s. 4.

[2] Locke on Government, p. 354, ed. of 1821.

"What," said the philosopher who gave up a just cause to the emperor Adrian, "would you have me dispute with him who commands thirty legions?"

Selden (says Vattel) relates[1] a solemn act, by which it appears that, in the time of Edward I., the British empire of the seas was acknowledged by the greatest of the maritime nations of Europe; and the republic of the united provinces acknowledged it in some measure by the treaty of Breda in 1667, at least so far as related to the honour of the flag. But solidly to establish a right of such extent, it were necessary to prove very clearly the express or tacit consent of all the parties concerned. The French have never agreed to this pretension of England;[2] and, in that very treaty of Breda just mentioned, Lewis XIV. would not even suffer the channel to be called the English Channel or the British Sea.

"The most important documents brought to prove this claim (says a writer in the Edinburgh Review, now generally understood to be Lord Broughám) are the *Ordinance al Hastings* in the second year of King John,[4] and the record of the dispute between Edward I.

[1] Mare Clausum, lib. ii. c. 28.

[2] This position of the Frenchman Vattel is not quite in accordance with the fact. Henry IV. conceded to Elizabeth the compliment of the flag, in consideration of naval assistance; but as early as in the negociations of 1662, Charles II. waived the claim from France.

[3] Vat. lib. i. c. 23, s. 289.

[4] "It ordered all ships laden or empty to strike their sails at the command of the King's governor or admiral, or his lieutenant. King John, being in possession of Normandy, was lord of both shores; and it has never been disputed that he is lord of the intermediate river who is lord of both banks. This, therefore, was nothing more than a mere municipal regulation for merchant-vessels, and implied nothing whatever of sovereignty."—*Quart. Review*, vol. vii. p. 23. But surely there is a difference between the banks of a river and the shores of the English Channel. Even the Straits of Dover are more than the width of two cannon-shots; and between the English coast and Normandy there is a channel of twenty-five leagues, a world too wide for the exercise of any municipal regulations. The following is a copy of the ordinance from the Black Book of the Admiralty, by which it appears that the law was quite general, "sur la mer."—"Fol. 57, in nigro libro Admiralitatis. Ordonne estoit a Haystynges pour loy et coustume de mer au temps du Roy John, l'an de son regne second, par advys de ses Seigneurs temporelz, que se le lieutenant en aucun voyage ordonne par commun conseil du royalme, encontrent sur la mer aucunes nefs ou vesseaulx chargees ou voides, que ne veullent avaller et abesser leurs trefs au commandement de lieutenant du Roy, ou de l'admiral du Roy, ou son lieutenant, mais combatant encontre iceulx de la flotte, que s'ilz peuvent estre pris, qu'ilz soient reputez comme ennemys, et leur nefs, vesseaulx, et biens pris et forfaitz comme biens des ennemys, tout soit que les maistres ou possesseurs d'icelles vouldroient venir apres et alleguer mesmes les nefs,

and Philip the Fair, in which deputies from several maritime states, themselves parties in the discussion, took the part of England and admitted her claim.[1] The claim comprehended, at the utmost extent in which England ever stated it, the sea from Cape Finisterre to Cape Stat in Norway. France never subscribed to it. When Holland at the beginning of Cromwell's protectorate, denied it for the first time, she was repeatedly defeated in the war which ensued and effectually humbled. The treaty of 1654, by a declaratory clause, fixed the utmost amount of this claim which Holland could be induced to admit. No mention is made of sovereignty even of the British sea, although Cromwell proposed that this should be generally stated, but the ceremony of striking the ensign and lowering the top-sail is stipulated on the part of 'all Dutch ships of war and others which shall meet any British ship of war in the British seas—eo modo, quo ullis retrò temporibus, sub quocunque anteriore regimine,[2] unquam observatum fuit.'[3] The same article was from this treaty copied into the treaty of Whitehall, 1662, art. 10, and the treaty of Breda, 1667, art. 19. When Charles II. being resolved to make war on the States General in 1671, sought for pretexts, and had recourse to some of the most groundless complaints, as that a Dutch fleet of war, on the Dutch coast, had refused to strike to an English yacht, which had been sent for the purpose of creating the dispute;[4] no farther claim was ever thought of than this absurd

vesseaulx et biens, estre biens des amys du Roy nostre Seigneur, et que le mayne estant en icelles soient chastiez par emprisonnement de leur corps pour leur rebellete par discrecion."

[1] "Selden, ubi sup.; Molloy, b. i. c. 5."

[2] "This refers to the pretext on which the Dutch refused the honour of the flag, viz. that the salute was a compliment to the King, and not due to the Commonwealth."

[3] "Treaty of peace and alliance, 1654, art. 13."

[4] Bynkershoek is of opinion that the Dutch were bound by treaties to strike their flags, in all the sea, inter septemtriones et promontorium cui nomen *Finis Terræ*. Yet these limits were not laid down till by the treaty of Westminster 1674. Therefore Sir L. Jenkins in his charge to the jury at the Cinque Ports Session of Admiralty in 1668, is very strong and general upon this subject: "You are to inquire (he tells them) whether any commander at sea has, upon any occasion, neglected to require and exact the just respects, deference and salutes due to H.M. flag from all foreign ships, and hath not fought, and, if need were, sunk such ships as have refused that ancient acknowledgment which all nations have, time out of mind, paid to the banner of England." (Life of Sir L. Jenk. vol. i. p. lxxxviii.) It appears from Wynne's Life of Sir Leoline Jenkins, and from Courtenay's Memoirs of Sir William Temple, that there were three rencounters with the Dutch: 1, "the affront given to H. M. yacht before the war," viz. in 1671, as it was fetching home Lady Temple and her children, and which De Wit justified upon pretence that the Dutch fleet being at anchor did not *meet* the king's yacht, and therefore was

interpretation of the right of salute.[1] The treaty of Westminster, which put an end to that war, merely stipulated the honours of the flag, in terms of the former treaties. (Treaty of Westm. Art. 6.) The treaty of Marine, concluded at London the same year, determined that the British seas extended 'from Cape Finisterre to the land Van Staten in Norway.' (Art. 4.)[2] There, with the intermediate treaties of 1678 (defensive), 1689 (of concert), and 1701 (of alliance), as well as the treaties of Breda, 1667, and the commercial treaty of 1668 (by which England first admitted to Holland the principle of *free ships, free goods*, and *vice versâ*, art. 9, 10, 11) were all renewed by the treaty of 1703, and formed the terms upon which the alliance between England and Holland subsisted, until the latter part of the American war. The treaty of Paris between England and Holland in 1784, contains a renewal of the stipulation respecting the flag, though in more general terms, placing this point 'upon the same footing on which it stood before the war.' (Art. 2.) The treaty of Amiens, 1802, contains no general renewal of former treaties, and no stipulation whatever touching the honours of the flag."

"It is, therefore, manifest (concludes the Edinburgh Reviewer) that, in so far as the intercourse between England and Holland contains the evidences of this right of sovereignty over the sea, the following points are proved:—that the British seas never extended beyond Cape Finisterre on the one hand, and Cape Stat on the other —that the claim never extended beyond the British seas—that it

not obliged to the salute. This yacht seems to have been sent to pick a quarrel, and the lady desired the English captain not to forbear from it on account of her family (Life of Sir W. Temple, vol. i. 349). 2, in 1674, in the Brill, when the Dutch ambassadors were on board one of their government yachts, and Sir L. Jenkins on board the British yacht on his return from the embassy to Cologne, after negociating the treaty of Westminster; when the former sent a message to the latter, that the Dutch ships were not to strike their flags, being within their own ports, but the affair terminated in the concession of the Dutch. From Sir Leoline's account of this rencounter, it does not appear to have been preconcerted (Life of Sir L. Jenkins, vol. ii. 697). And 3, in 1675, in the very same place where the former encounter had happened, when he forced the same respect from two other men-of-war belonging to the States-General. (Life of Sir L. Jenk. vol. i. p. xxiii.)

[1] It appears from Sir L. Jenkins's Letters from the Embassy at Cologne that an acknowledgment of his Majesty's dominion in the British seas was thought of, and that the States-General were, therefore, glad to exchange the words "British Seas" in the treaty of Breda, to certain geographical limits in the treaty of Westminster.

[2] It is the treaty of Westminster, art. 4, and not the treaty of Marine, that omits the words "British Seas," and stipulates for the honours of the British flag "in any of the seas from Cape Finisterre to the middle point of the land Van Staten in Norway."

was admitted by the Dutch to have been well-founded originally, and not to have been constituted by the treaty of 1654—that it has never extended to any other right than that of the salute, and that even this right of salute was abandoned in 1802."[1]

The following apology for the British dominion of the seas appeared in the Quarterly Review; and is understood to have been written by Mr. Croker, at that time Secretary to the Admiralty:

"The superiority, which we have obtained by the skill and valour of British seamen, has been used with British generosity and moderation. But we confess it has frequently occurred to us that the charge of wishing to exclude the universe from that element which constitutes three-fourths of the globe, and of throwing a barrier across the common highway of nations, might have been answered by a public declaration, stating clearly and explicitly what those maritime rights are, 'which (to use the words of Mr. Abbott, when speaking in the names of the Commons of England) we have resolved never to surrender.' The ground on which we stand is too firm and too elevated to require us to rest our foundation on undefined pretensions. We may with safety not only declare what those rights are, but further, that we shall wage interminable war rather than abate or compromise one iota of them. We hold the full and free *use* of the ocean, and every part thereof by the whole universe, as a fundamental principle of public law, subject only to those regulations which have been established and sanctioned by the law of nations. England, it is true, has long claimed the *sovereignty* of the seas, as a right which universal conquest has fairly given her —a right which we trust she will long continue to hold for her own honour, and for the general happiness of mankind. Her sovereignty, however, is purely *military*, and in other respects but a 'barren sceptre;' for we repeat, that at no period does it appear that she ever intended to set up any claim to a legal and possessory right to the sea, *to the exclusion of other nations.*"[2]

It would be impossible to enforce such a claim over the universal sea, even in time of war; and what becomes of it in time of peace? But the Reviewer would arrogate all the sovereignty possible, and that is, the reputation of being the greatest naval power, which (to use the language of Dr. Aikin) he confounds with maritime dominion, or what the

[1] Edinb. Rev. vol. xi. pp. 17, 18.

[2] Quart. Rev. vol. ix. pp. 297, 298.

civilians call sovereign jurisdiction as distinguished from useful domain. If he mean anything further by the word "sceptre"—if he use it to imply the right of salute, he claims much more than his sovereign insists upon; for by the "Regulations and Instructions relating to His Majesty's Service at Sea," established by Order in Council, 1808,[1] it is only "within His Majesty's Seas" that his ships are not to salute any foreign ship: in any other seas, they may salute coinstantaneously with the foreign ship. The dominion of the British seas has not always been considered (as will be hereafter more fully shown), like this claim of universal maritime sovereignty, as a mere empty boast.

The article in the Quarterly Review was written during the rage of war both with France and America, and boldly rests the British sovereignty of the seas upon no other right than that of conquest. But since the present peace, whatever language England may hold, we do not see her acting as the mistress or guardian even of the British seas, for in the case of the captures by Tunisian pirates in the year 1817, the British government claimed the right of preventing such captures only in the channel, or within sight of her shores. Still it will appear from the following article in the Ghent Journal, of 18th July 1817, how galling to the rest of Europe is our arrogant national song of "Brittania! rules the waves!"[2]

"Europe is under the yoke of England. This is one of those truths, which, in the eyes of all men who make use of their intellectual faculties, has all the character of mathematical demonstration. This yoke is more real than that of Napoleon, although invested with less humiliating forms. England has escaped its ruin, only to revenge itself upon the independence of nations. Its flag, which explores the world, forms, now-a-days, the great power; and, unhappily, this power is stronger and more inaccessible than that of armies. One cannot but admire the art with which it has manufactured the net, which it has thrown over the globe. The first mesh, as a celebrated publicist has observed, is fixed to Heligoland, and the second to Jersey. From these

[1] Chap. ii. of Salutes, s. 24.

[2] Besides this song, Thomson wrote a poem, entitled, "Britannia," equally full of the *imperium pelagi*.

it commands all the issues of Germany, watches over the Sound, intimidates Sweden and Denmark, and presses on the coasts of Holland and France. In the centre of this line rises the metropolis, between the south and the north of Europe. Its eccentric position renders its maritime power the tyrant of the European seas. Gibraltar and Malta secure to it the entrance and the centre of the Mediterranean. From the Ionian Islands it superintends the Adriatic and Greece. The Cape of Good Hope opens to it the route to India. By means of Malabar, Ceylon, &c. it comprises Asia. New Holland renders it mistress of the south. At Trinidad it has one foot on the Spanish continent. At St. Lucia, Jamaica, &c. it watches the Havannah and the Antilles. The occupation of Canada and Newfoundland completes this immense chain, which seems to bind together the two worlds. This preponderance, as ignominious as it is contrary to the rights of nations, is the object of universal hatred; and it may be asserted that nineteen-twentieths of the inhabitants of Europe would rejoice at the fall of this terrible colossus."

There is nothing in all this but colonial possession, as free to other nations to acquire as to Britain; but the cry will always be echoed by all naval powers against the greatest. "Que dites-vous des Anglois?" (asks Montesquieu) "voyez comme ils couvrent toutes les mers! C'est une grande baleine; *et latum sub pectore possidet æquor.*" There can be no doubt, however, that the Speaker of the House of Commons and the Quarterly Reviewer alluded to the British Orders in Council of 1807, which nothing but our naval superiority enabled us to inforce. Even when we see Great Britain claiming the empire of the sea only throughout the British Channel on the south, extending to the shores of France and those of Spain, as far as Cape Finisterre,—thence by an imaginary line west, 23 degrees of longitude from London, to the latitude of 60 degrees north, which is called the Western Ocean of Great Britain,—thence by another imaginary line in that parallel of latitude to the middle point of the land Van Staten on the coast of Norway, which is the northern boundary,—and from that point, along the shores of Norway, Denmark, Germany and the Netherlands, to the British Channel again, which last boundary comprehends what is called the Eastern Ocean of Great Britain; and when we consider what are the bene-

fits which are said to accrue to the nation possessing merely this limited empire, we ought not to hesitate in declaring that the arrogation of such a dominion, without the acknowledgment of other nations, would constitute a just pretence for war on the part of all those nations till it should be repressed. It is also manifest that, if the law of the strongest is always to prevail with regard to this sovereignty of the seas, there can be no peace except that which shall be purchased by a compromise of the natural law of nations.

"The Cinque Ports (continues the same Quarterly Reviewer) considered their jurisdiction to extend half seas over; the Trinity House were of opinion that the British seas extended from Cape Finisterre to the middle of Van Staten Land in Norway, and from thence northward of Scotland and the isles thereof. The Lords of the Admiralty having, in 1712, called on Sir Charles Hedges, Judge of the Admiralty, for his opinion as to the extent of the British seas, he delivered it as follows, which our readers will perhaps be inclined to consider as that of a good courtier, rather than of a sound lawyer:

"'1. I take it without any doubt that the four seas, namely, east, south, west and north, are within her Majesty's sea dominions as Queen of Great Britain. 2. That the east and south parts of this dominion extend to the opposite shores, and if a line be drawn from Berwick to the Naze in Norway, and another from Cape Finisterre to Cape Clear, or the most western point of land in Ireland, I conceive the space within those lines has been always reputed a part of the British seas; but I cannot say this is the utmost extent of them southward, there being some opinions that carry them further. 3. If a line be drawn from the North Foreland to Calais, and another from the islands of Scilly to Ushant, I think the space between those lines and the opposite shores describes that part of the British seas called the Channel, and the other space from the Channel to the Naze is called the German Ocean.' After describing the seas of Scotland and Ireland, he goes on to say that, 'if the British dominion may be extended as far from the Irish seas to the westward, in any proportion that the ocean bears to the Mediterranean, the Gulph of Venice, the Euxine, Sound, Belt or White Sea, which are possessed by several princes or states, who restrain those respective dominions, the Queen of Great Britain may take in many more leagues than any of them do miles; or if they claim by virtue of being possessed of opposite shores, her

Majesty may by the same rule claim the Western Ocean beyond Ireland.'[1]

"When Sir William Temple boasted (remarks the same writer) that by the treaty concluded in 1673, between King Charles II. and the States General, the flag was carried to all the height his Majesty could wish, because it was stipulated, in the 4th article of that treaty, 'that the States General in the United Provinces, in due acknowledgment on their part of the King of Great Britain's right to have his flag respected in any of the seas from Cape Finisterre to the middle point of the land Van Staten in Norway, agree, &c. that their ships shall strike their flag and lower their topsail, &c.,' Sir Philip Meadows asked 'What has England to do with the Bay of Biscay or sea of Norway? From Cape Finisterre to Van Staten is a greater stride than the British seas (as in former treaties the article stood), but then it weakens our standing. The limits fixed between the two Capes are too wide for dominion, too narrow for respect. The crown of England claims no dominion in any seas but the British only, yet it claims respect everywhere and in all seas.'"[2]

The following moderate doctrine is all that Lord Stowell had occasion publicly to let fall upon the subject even during the war: "It might likewise be improper for me to pass entirely without notice, (though without meaning to lay any particular stress upon it,) that the transaction in question [a neutral's resistance of visitation and search] took place in the British Channel, close upon the British coast,—a station over which the crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction, which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts."[3]

The war being at an end, Lord Stowell, on the 15th December 1817, pronounced the following just opinion upon the main question: "The second fundamental principle of public law is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire

[1] Admiralty Records.

[2] "Letter from Sir P. Meadows to Mr. Secretary Pepys," Quart. Rev. vol. ix. pp. 301, 302.

[3] 1 Rob. 352, 353, The Maria.

equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. Upon a principle much more just in itself, and more temperately applied, maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations, more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances, more or less moderately assigned, subject foreign vessels to such examination."[1]

The following are the prerogatives which are said to belong to the British dominion of the seas:

I. The prescribing of laws and rules for navigation, not only to the sovereign's own subjects, but to other strangers, whether they be princes of equal strength and dignity with himself, or any way inferior.[2] The jurisdiction of the King of England is always taken to be *infra quatuor maria*, such as are born thereon not being aliens.[3]

II. The exacting of maritime honours. England claims from all foreign ships, which navigate what she calls the British seas, that they shall salute her ships of war by lowering the topsail, or striking the flag, in like manner as they do to her forts upon land.[4]

The honours of the flag were expressly admitted to France in the Mediterranean by the Dutch, in the offensive and defensive treaty of 1635. The three Straits between Denmark and Sweden are under the dominion, and are considered as the property of, the King of Denmark, who also claims a right of excluding foreigners from fishing and even navigating the seas adjacent to Iceland and Greenland, for the space of four miles from the former and fifteen from the latter. But

[1] 2 Dodson, 243, 245. A gunner cannot justify the act of firing upon a vessel, by an order from the governor of a colony,—requiring all vessels before they proceed to sea to be provided with passes from him, on pain of being fired at and compelled to pay for the shot and powder; Newfoundland Cases, 274.

[2] Molloy, p. 78. [3] Co. Litt. 244, a.

[4] Molloy, p. 79; but see Order in Council, 1808, c. ii. Of Salutes.

the right of fishing has been disputed by many nations, particularly by the United Provinces. Our King Henry VIII. condescended to renew a treaty which his predecessor had made with John II. of Denmark, in which it was mutually covenanted that "the liegemen, merchants and fishermen of England should fish and traffic upon the northern sea betwixt Norway and Iceland, but under a proviso of first asking leave, and renewing their licences from seven years to seven years, from the Kings of Denmark and Norway and their successors."[1] The maritime honours required by Denmark, in consequence of the supremacy claimed by that power over the Sound and Belts at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other states, and especially by the convention of 15th January 1829, be-

[1] Sir P. Meadows on the Dominion and Sovereignty of the Seas. Selden proves that Denmark has always possessed the sovereignty of the North Sea, Britain having what the civilians call a servitude on it; Lib. ii. c. 52. There is a case in 3 Swanston, 603, from Lord Nottingham's MSS. in the years 1673 and 1674, which first came before the Privy Council as a state-complaint against a Dane who had come to England, for seizing an estate of English subjects in Iceland, as confiscate for fishing there, in derogation of letters-patent granted to the Dane by the King of Denmark, in which it is said the English insisted upon it that they had a right of fishing there, which they had used for fifty years before the seizure in 1668 and ever since, the English having always traded thither and keeping constant warehouses there. This case was afterwards brought before the Court of Chancery upon a bill by the Dane to stay several actions at law commenced against him for seizing certain goods of the defendants for trading to Iceland, contrary to certain privileges claimed there by the plaintiff and others. Lord Chancellor Nottingham decreed perpetual injunction, upon the principle that a mother country has the sole right of trade to her own colonies. "This cause was dismissed from the Council Board (he says) being not looked on there as a case of state, because, for aught that appeared to them, it might be a private injury and unwarrantable, and so fit to be left to a legal discussion; but now the very manner of the defence offered by the defendants has made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of great consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war, and if it had been known at the Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in Westminster Hall. But in truth this pretence of articles of peace must needs fail the defendants, for the articles of free trade are reciprocal, and are understood on both sides, with exception to the laws and customs of each kingdom. Here the plaintiff hath proved letters-patent from the King of Denmark for the sole trade of Iceland, a seizure by virtue of that patent, a sentence upon that seizure, a confirmation of that sentence by the Chancellor of Denmark, an execution of that sentence after confirmation, and a payment of two-thirds to the King of Denmark after that execution."

tween Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime powers of Europe, according to the protocol of the congress of Aix la Chapelle, signed 9th November 1818, by which it was agreed by the ministers of the five great powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred to the ministerial conferences at London, and that the other maritime powers should be invited to communicate their views of the subject, in order to form some such general regulation.[1]

The Straits of Sicily are under the dominion of the King of Sicily. The Gulf of Bothnia is under that of the King of Sweden. The Turkish Emperor claims dominion over the Black Sea, the Egean, the Bosphorus of Thrace, the Propontis, and the Hellespont. Over the first of these, he exercises his right of proprietor and sovereign in such a manner as not to permit even the entry or navigation of it to any nation, to whom he has not granted it by treaty. By the treaty of Adrianople, in 1829, the free navigation of the Dardanelles and the Bosphorus was recognized between Russia and the Porte, both as to Russian vessels and those of other European states, in amity with Turkey.[2] The claim of the republic of Venice to the seignory of the Adriatic Sea, (as conferred upon her by Pope Alexander, in gratitude for supporting him in the famous league of Lombardy,) and that of Genoa to dominion over the Ligustick Sea, were always disputed by other nations; although in confirmation of the right of Genoa we are referred to acknowledgments of Uladislaus King of Naples, of the Emperor Frederick III., and of some of the Kings of Hungary, who asked permission for their vessels to pass through that sea. This may have been done from policy, when these sovereigns were not in a condition to deny the right; but it was scarcely a confession of it; and as these pretended empires are respected only while the nation, which lays claim to them, is able to support them by force, they consequently fall with its power.[3] After many disputes with respect to the dominion of the Baltic,

[1] 1 Wheaton's Intern. Law, 203. [2] Id. 221.
[3] De Martens, lib. iv. c. 4, s. 156; Vat. lib. i. c. 23, s. 289.

and particularly with respect to the honours of the flag, some of the states situated on its shores have agreed to yield those honours in certain districts, and omit them reciprocally in others.[1] In the British answer to the Russian declaration of war in 1807, it was denied that we had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained, however we might, at particular periods, have forborne for special reasons to act in contradiction to them.[2]

The following seas are acknowledged free, viz. the Spanish, the Aquitain, the North, the White, the Mediterranean, and the Straits of Gibraltar.[3]

III. The right of pre-emption, or to detain the merchandize of strangers, as it passes through our seas, in order to afford to our own subjects the preference of purchase. This right is fully discussed in our quotation from Puffendorf, on the duty of granting passage for the merchandize of one nation through the dominions of another.[4]

IV. Of the same right, and of like nature, is the claim of staple-toll, which is above described by Puffendorf, and which also consists in not allowing foreigners to set their merchandize to sale except at the king's staple, and in imposing customs and duties thereon. The right of claiming tolls-thorough, or passage-duties for goods carried across the dominion, either by land or water, is more equitable, since they are levied for the maintenance of the roads and navigation, protection from pirates, or erection of light-houses and sea-marks.[5] If the state think proper to exempt its citizens from paying the toll, strangers have no right to complain; but this right of toll is abused when the passenger is obliged to contribute a sum, which bears no reasonable proportion to the expense of preserving these public passages.[6]

V. The right of fishery, and of taking tolls from foreigners for permission to fish in our seas.[7]

"Some writers (says the same writer in the Edinburgh Review before quoted) pretend that the salute is only one consequence, or more properly an acknowledgment of a general sove-

[1] De Martens, ubi sup.
[2] Annual Reg. vol. 49, p. 773.
[3] De Martens, ubi sup.
[4] Grot. l. ii. c. 2, s. 14; Puf. l. iii. c. 3, s. 6.
[5] Molloy, p. 78.
[6] Vat. b. i. c. 9, ss. 103, 104.
[7] Molloy, p. 78.

reignty, and enumerate other rights—as of fishing, imposing customs on the navigation and fishing of foreign nations, and prescribing laws to the navigation of nations living on the banks of the British Sea. But the only instances of such rights ever being exercised are very ancient, if not doubtful, if we except a tradition of Queen Elizabeth having prevented the French from building above a certain number of ships of war, which is rather to be viewed as an exercise of power by means of threats, than an exercise of right.[1] At any rate all such pretences have long been given up. As far back as 1604, the proclamation of James I. shows that the jurisdiction anciently claimed was now confined to those bays, called the King's Chambers, *id est*, portions of the sea cut off by lines drawn from one promontory to another of our own island."[2]

In the negotiations for the treaty of Westminster 1674 with the States General, the British ambassadors claimed the annual sum of 12,000*l.* for the liberty of fishing on their coasts, but nothing appears upon the subject in the treaty itself.

"As to the fishery (says Sir L. Jenkins, in his letters from the embassy) we have more to say for his majesty's right to demand an acknowledgment than we have for his possession of any droit regularly paid upon that account, for besides that many writers of good note do hold that fisheries may be appropriated in the high seas, as well as in rivers and lakes, it is certain that the republic of Genoa do let to farm the fishing of thunnies in their neighbour sea, and the con-

[1] Molloy, lib. i. c. 5. Molloy cites no authority for this, but according to Vattel (b. iii. c. 3, s. 50) preparations for war on the part of one state during peace, by equipping a fleet, justify another in requiring securities, or in commencing war should they be refused. The Spanish forts and lines before Gibraltar were demolished by the Spaniards, with our most willing co-operation, on the occupation of Spain by Buonaparte in 1810. Some years afterwards, when the French power was overthrown, the King of Spain wished to re-build them, but the governor of Gibraltar (Gen. Sir George Don) would not permit the erection of works against his fortress. These lines were originally constructed in 1731, and the British agent was instructed then to remonstrate against them; but he writes, "I was assured if the whole universe should fall upon the king to make him desist, he would rather let himself be cut to pieces, than consent." 3 Coxe's House of Bourbon, 240. So by the treaty of Paris in 1815, between the allied powers and France, it was stipulated that the fortifications of Huningen within the French territory, which had been constantly a subject of uneasiness to the city of Basle, in the Helvetic confederation, should be demolished, and never renewed at a distance of less than three leagues from Basle.

[2] Selden, lib. ii. c. 22; Ed. Rev vol. xi. pp. 18, 19; Quart. Rev. vol. ix. pp. 298—300.

tracts between Queen Elizabeth and Denmark about the liberty of fishing on the coasts of Norway, as well as the prohibitions made and the licences given by that crown, do at this day sufficiently evidence that the Dane is, and hath been of a long time, in possession upon the coasts of Norway of so much as we contend for to be due to his majesty upon his seas. As for our domestic evidences, we have an act of parliament in 2 Rich. II. for imposing sixpence per ton upon every vessel (as well stranger as our own) that fished for herrings within the admiralty of the north: we have the several successors of that king granting licences to the French, and the subjects of the house of Burgundy, to fish on our coasts; and the like licences have been taken out by the fishermen of Dieppe and by the city of Bruges, even since his majesty's happy restoration. We have some instances made by King James, by his ambassador in Holland, and by his secretary of state at home, for the adjustment of this affair with the Dutch, and we have an acknowledgement actually paid by the Dutch, and accounted for to the exchequer by the Earl of Northumberland in his late majesty's reign.[1] That which the Dutch object to us, is their quiet possession of the liberty of fishing these last two hundred years, and the treaty called *Intercursus magnus* between Henry VII. and the house of Burgundy in the year 1495. For the possession it appears by our records it was still with the licences of our kings, strangers always either having special licences, or else being under the protection of the special officers of those times, appointed for the safe guarding of the fishing. For in Edw. IV., Rich. III. and Hen. VIIth's time, there were officers empowered by patent to that effect, and as they had certain dues for that attendance, so they were to levy them upon all foreigners, with this express direction in Henry VIIth's time:— that the same was to be levied notwithstanding any letters of safe-conduct that strangers fishermen might have from any king, prince or governor whatsoever. Besides, the Dutch asking leave from the governor of Scarborough to fish was

[1] The Quarterly Rev. (vol. ix. p. 300) says that the ambassador of the States General in England remonstrated against this unprecedented proceeding and disavowed the act of their fishermen; but see Rushworth's Collections, vol. ii. p. 322, and Whitelock's Memorials, 24.

in practice in Queen Elizabeth's time;[1] and King James by proclamation in the seventh year of his reign prohibited all strangers to fish in the British seas without leave first asked and obtained, which, together with what the Earl of Northumberland did in levying this droit, shows how interrupted and precarious the possession pretended by the Dutch hath been all along. As to the *Intercursus magnus*, it is not to be denied but that the first war which the crown of England had with the house of Burgundy after that treaty extinguished all the privileges, and cancelled all the obligations in it. Nor can it be pretended they were revived by any subsequent peace since, further than treaties or articles can be showed, specifying the particulars so revived; and how far that *Intercursus* is out of date is sufficiently evinced, in that the English cannot at this day in virtue of it make any title to the many great privileges accorded by it to the English; no, not among those that are truly subjects, as the Spanish Netherlands are, to the rightful successors of the house of Burgundy. Nor would the city of Bruges have sued out his majesty's licence for their fisher-boats, as they have done, had there been any colour of right yet remaining to them by that old treaty. Besides, supposing that treaty to subsist, which is against all reason and practice to suppose, and that it obliges the crown of England to suffer the subjects of the house of Burgundy to enjoy a liberty of fishing without licence, it is not easy to conceive how the King of Spain could (in declaring, as he hath done, a parcel of his dominions and subjects to be a free state, or what else themselves would please, that is, no longer subjects to him, nor part of his dominions) transfer an obligation supposed to lie on the crown of England, and vest it in a new-erected republic, that pretends not to derive any thing from him or his predecessors that had made this treaty; much less hath any privity in that contract, nor yet any acceptance or consent from the kings of England, that may give colour to any such transference."[2]

But notwithstanding that the ocean and the four great seas,

[1] Sir P. Meadows observes that Mr. Camden has produced no authority for this assertion.

[2] Life of Sir L. Jenkins, vol. i. p. 223—225.

which compose it, are acknowledged to be the common possession of all nations,[1] yet all writers agree that the sea surrounding the coast, as well those parts of it which are land-locked, such as roads, bays, gulfs, &c., as those which are situated within cannon-shot of the shore (that is, within the distance of three leagues[2]), are so entirely the property, and subject to the dominion, of the sovereign of the coast, that he has the exclusive right to all the property thereof, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor of the specific thing; that he can forbid the navigation of foreigners in his roads and their entry into his ports, can impose duties, tonnage, &c., fees of entry, of clearance, &c., and institute tolls for the benefit of the navigation, and may exact the maritime honours, allowed by custom to those who have the dominion over any part of the seas.[3] But if, instead of taking possession of any of these rights, the nation have once acknowledged the common right of other nations, it can no longer exclude them from it. "Thus the English" (says Vattel), "not having originally taken exclusive possession of the herring-fishery on their coasts, it has become common to them with other nations."[4]

The exclusive territorial jurisdiction of the British crown, over the enclosed parts of the sea along the coasts of Great Britain, has immemorially extended to those bays called the *King's Chambers*, id est, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries, forming portions of their territory. It appears from Sir Leoline Jenkins, that in the reigns both of James I. and Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near

[1] Puf. lib. ii. c. 5. ss. 9, 10.

[2] Rather miles, 5 Rob. 17. By the treaty of 31 Dec. 1806, between Great Britain and the United States of America, the distance was enlarged from three marine miles to five.

[3] Grot. lib. ii. c. 3, ss. 7, 8; Puf. lib. ii. c. 5. s. 8; Vat. lib. i. c. 23, ss. 287, 295.

[4] Vat. lib. i. c. 23, s. 287. See the excellent article on the British fisheries, Quart. Rev. vol. ix. pp. 298—300.

the natural coasts and harbours of Great Britain, as to disturb or threaten vessels homeward or outward bound, and that captures by such foreign cruizers, even of their enemies' vessels, would be restored by the Court of Admiralty, if made within the King's Chambers. So also the British *hovering Act* passed in 1736 (9 Geo. II. c. 35), assumes for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be brought within that distance without paying duties. A similar provision is contained in the revenue laws of the United States.[1]

The rights exercised on the sea near the coasts are also exercised in those straits, which are not wider than the range of two cannon-shots; but when they serve for a communication between two seas, the navigation of which is common to several nations, the nation which possesses the strait, cannot refuse the other a passage through it, provided that passage be attended with no danger to herself.

What has been said of straits which are too wide for the claim of empire and the right of property, as the Straits of Magellan, equally applies to similar bays, as Hudson's Bay. A bay, whose entrance can be defended, may be possessed, and rendered subject to the laws of the sovereign; and it is of importance that it should be so, since the nation might be much more easily insulted in such a place than upon a coast that lies exposed to the winds and waves.[2]

Such regulations can only be justified on the ground of their being essentially necessary to the security and interests of the state. They are not intended to assert an exclusive right of sovereignty and domain over such extensive portions of the sea. Even a claim to contiguous portions is not to be viewed with much indulgence; it is to be strictly construed and clearly made out. "It is" (says Lord Stowell) "a claim of private and exclusive property over a subject where a general, or at least a common, use is to be presumed; it is a claim which can only arise on portions of the sea, or on rivers flowing through different states. In the sea, out of the reach

[1] 2 Sir L. Jenk. 727, 728, 780; 2 Dod. 245; Vat. Droit des Gens, liv. i. c. 22, ss. 288.

[2] Vat. lib. i. c. 23, ss. 291, 292.

of cannon shot, universal use is presumed; in rivers flowing through conterminous states, a common use to the different states is presumed. Yet in both of these, there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states: the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated—by clear and competent evidence." [1]

B. F.

ART. VII.—HUGHES ON CONVEYANCING.

A Practical Treatise of the Laws relative to the Sale and Conveyance of Real Property; with an Appendix of Precedents, comprising Contracts, Conditions of Sale, Purchase, and Disentailing Deeds, &c. By William Hughes, Esq. of Gray's Inn, Barrister at Law. 2 vols. Saunders and Benning. London. 1840.

THE author of this work states his object to be, to present to the profession "a clear and concise view of the law of vendors and purchasers, and the principles and practice of conveyancing, arranged with a view of conveying instruction to the student and general information to the practitioner;" and this useful object is in a great measure attained. He modestly styles his work a compilation, and he seems to have collected with industry and care the practical wisdom and experience of Sir Edward Sugden, Butler, Preston, Hayes, and other writers on the subjects comprised within

[1] 3 Rob. 339; 1 Wheaton's International Law, 219.

the scope of his treatise. It is impossible to give any idea of the merits of such a work by extracts: we can only say generally that it seems to embrace all the heads and questions interesting to a conveyancer, and that the points are for the most part correctly stated. We have, however, in looking through the volumes, detected errors, some of which we will now mention, in the hope that they will be corrected in a second edition.

In vol. i. p. 84, it is treated as doubtful whether a feme covert can convey lands which she holds as trustee without her husband joining in such conveyance; as to which there seems to us no reasonable doubt whatever. In such a case the feme is not solely seised or entitled, but she and her husband are seised together in her right, and of course no complete conveyance can be had without the concurrence of the husband.

In the same volume, p. 94, it is said, that the parishioners or inhabitants of any place are disabled from purchasing lands by those names, because a corporation cannot hold lands without a licence from the crown. This is inaccurate. It is true, that a corporation should be enabled by a licence from the crown, or act of parliament, to hold lands; but the fact is, parishioners are not a corporation, and on that account a devise or conveyance to them is void, they as a body having no existence in the eye of our law.

In the same volume, p. 268, our author says, that, under 1 & 2 Vict. c. 210, a judgment creditor could follow the lands in the hands of a purchaser, although he, the purchaser, should obtain an assignment of a prior outstanding term vested in a trustee in trust for the vendor, and although the purchaser had not notice of the judgment. This is clearly a slip, for, as the author himself states, the statute just mentioned does not operate against purchasers unless they have notice of the judgment, and this is by the subsequent stat. 2 Vict. c. 11.

In vol. ii. p. 20, our author seems to consider it clear, that, in case of a conveyance to A. B. and his heirs to such uses as he should appoint, and A. B. appoints to C. D. under his power,—the covenants for title entered into with A. B.

would not run with land in the hands of C. D.; but in a subsequent page (p. 70) the author seems to forget this, and gives another, and, as we think, a better opinion,—that, in such a case, the covenants would run with the land.

In the same volume, p. 74, we read "the late Fine and Recovery Substitution Act has introduced a new covenant into purchase deeds, which, where the circumstances of the case require it, must be considered as a usual one, and such as a purchaser has a right to insist upon, and this is a covenant that the deeds shall be acknowledged by the vendor's wife where it may be necessary to convey or extinguish any estate or claim she may have in the lands to be conveyed." We are glad to say that no authority is cited, and though we have seen such a covenant, we consider it not merely useless but absurd: where it is used, we think it should be either preceded or followed by a covenant, that the male conveying parties will not merely sign and seal the deed, but also duly deliver it.

Notwithstanding the errors we have pointed out, and some others which remain unnoticed, we can say that the work before us is a useful book, as giving in a small compass (without reasons and disputations, which have now lost their interest) much important information.

W. C. W.

ART. VIII.—THE MASTERS' OFFICES.

Facts and Suggestions respecting the Masters' Offices.

THIS is understood to be from the pen of one of the Masters in whom the public are most inclined to place confidence, and the anomaly of such a production from such a quarter entitles it to a passing notice at the least. A Master writing about the Masters' offices! A freemason breaking faith! A priest disclosing the mysteries of the temple! A gaoler revealing the secrets of the prison-house! But the fraternity have no reason to be afraid: these facts and suggestions are all facts in their favour, or suggestions for their benefit; and instead of a sweeping exposure, or indiscreet avowal, we find a spirited, judicious and (with few exceptions) satisfactory defence.

According to the writer, we have all been labouring under two grand errors: error the first, that much good could be done by making the Masters' sittings public; error the second, that the comparative diligence of the Masters is to be estimated by the number of hours they may be actually found sitting in Southampton Buildings. He boldly asserts, and certainly goes some way towards proving the assertion, that you cannot get a public for them; and that the most hard-working Masters are (or may be) precisely those who spend most time in their own houses.

As it is no more than fair that the accusation should be heard as well as the defence, we will first give a description of the alleged evils; and we know not where we could find a better than that given by the most effective parliamentary advocate of Chancery reform in all its branches, Mr. Pemberton:

"I now come to an office of a different description, which, I confess, I approach with reluctance—I mean the Master's office. I have the honour to be personally acquainted, more or less, with all those gentlemen, and with many of them, am fortunate enough to be on terms of intimacy and friendship. Speaking of them generally, I sincerely believe that more amiable, or honourable, or conscientious men do not exist, and several of them are very excellent lawyers; and yet it is impossible to deny, that it is against their office more than any other that the opinion of the profession is directed. According to that opinion—

Umbrarum hic locus est—somni noctisque soporæ.

"The system appears to be contrived to damp all energy. Which of the ordinary motives to exertion is left to operate on the minds of the Masters? Secluded in the recesses of their dark chambers—exempt from the control or inspection of the judges—relieved from the competition of the bar—independent of the opinion of the solicitors, and their proceedings totally unknown to the public—acquiring no credit by diligence or ability—incurring neither loss nor censure by indolence or inattention—with nothing to hope and nothing to fear—can any men be placed in circumstances so unfavourable to exertion? Can it be expected that they should themselves perform the irksome duty of unremitting attention to subjects the most unattractive, or rigidly discharge the duty, perhaps still more irksome, of stimulating and compelling to constant activity the parties who attend them—the solicitors and their clerks—all affected, more or less, by the *genius loci*? This control over the practitioners before them, is perhaps more material than any thing else in order to prevent the delays in the office. I know not whether, under the present system, the Masters possess the power of control—certainly it is not exercised. The course of proceeding is described by Mr. Field, who very fairly attributes to his own brethren, the solicitors and their clerks, the principal share of the blame. He tells us, that they attend the Master or his clerk (who really does the greater part of the business) when they have nothing else to do; that any excuse is sufficient for neglecting to attend a warrant; that it is considered a want of courtesy for a solicitor to insist upon any thing like strictness in such matters; that three or four warrants are often taken out before any one is attended, the clerks settle it among themselves, and the Master does not interfere. What is the effect of this? Why, that which might be done in an hour, occupies weeks, and the business of weeks is protracted through years."

Then comes a statement supported by the same authority, Mr. Field's very valuable pamphlet, to the effect that warrants can only be obtained at an interval of several days; that there are only about 180 days in each year on which warrants are made returnable; and that a warrant is generally an appointment for half an hour only—

"Let any merchant or man of business consider how soon a long and intricate account, extending through a series of years, is likely to be settled by such a course of proceeding, by the devotion to it of half an hour or an hour at a time at intervals of days—weeks—months; when, probably, at each succeeding meeting, what passed

at the last is forgotten, or denied, or disputed. It is rather to be wondered at, that, with such a system, accounts are *ever* taken—difficult inquiries as to facts *ever* answered—than that matters of this kind only emerge after a lapse of years, from the offices in which they have so long slumbered, and that many of them sleep there the sleep of death, and never emerge at all."

The author of *Facts and Suggestions* first applies himself to show that, obscure and irksome as the duty may be, it must remain so, the wished-for incitement being hopelessly unobtainable:

"It would certainly be better if all that passes in the Masters' offices were notorious—if they could transact their business in the presence of a bar and reporters and an audience, in the full blaze of publicity: the public would see with whom the delays that have been complained of rest, and would, in most cases, have the remedy in their own hands.

Unhappily, this publicity is impossible.

To prove this, I will shortly explain some of the peculiarities of the Master's court, and if I appear to state much that is trite, my apology must be the general ignorance on the subject.

The Master's court differs from almost every other English court in three principal points:

1. That the greater part of the business transacted in it is not litigated.

2. That the judge acquires his information on the questions submitted to him almost exclusively by the perusal of written documents.

3. That it is a court in which the suitor, not the judge, appoints the times of hearing and of deciding."

The business, he goes on to say, may be divided into three branches, 1. inquisitive; 2. administrative; 3. judicial. Under the first head, he classes references to inquire, who is the heir or next of kin of a lunatic? who the relations, and what the fortune, of an infant? who the representatives of a testator at his death?—questions as to which the parties before the court are agreed, but it is notwithstanding the Master's duty to institute the inquiry lest the interests of others should be compromised.

Under the second head, are classed the steps to be taken or the proceedings to be ordered on behalf of persons (lunatics or infants, for example) who are incapable of acting for

themselves. Here, again, the parties before the court are frequently agreed, and the Master's duty is to prevent them from injuring those who are not. "He is the protector of parties who are virtually unrepresented, and has to contend, without assistance, against the avarice of committees, the wastefulness of guardians, the jobbing of surveyors, and the general tendency to despoil the absent, the unascertained, and the defenceless."

The third head, the judicial, is that by which the largest portion of the Master's public time, and the least of his solitary time, is occupied. It is said to consist principally of questions of procedure; which differ from other questions in this—others affect the client only, and these the practitioners.

It is stated as a prevalent, but erroneous, opinion, that accounts form the great business of these offices:

"The mere comparison of the different items with the vouchers is indeed a long process; but it is performed by his clerk, and might be done by a person of far inferior qualifications. And when items are disputed, a decision on one of a class generally disposes of many more. It is on these, however, and on the disputed claims of creditors, and on points of title, that the legal questions argued before the Master principally arise. They form the most difficult portion of his business, but the smallest, and, both as regards the number of persons interested, and the nature and magnitude of their respective interests, the least important."

The second peculiarity of the court is, that the judge acquires his information almost exclusively from written documents. He can read them just as well, perhaps better, in his own study; and what is called "a hearing" may consist entirely of the delivery of documents, or the statement of the conclusions deduced from them—

"Even as respects that portion of the Master's business which I have termed judicial, with the exception of questions on procedure and costs, the Master has generally much more to read than to hear. The disposition to waste time, which has been attributed to all that breathe the air of Southampton Buildings, certainly does not lead them to waste it in long speeches. Before most tribunals, half the speaker's time is necessarily spent in stating his case, and the greater part of what remains is employed for the benefit, not of the judge, but of the audience. The Master knows the facts, and therefore they are scarcely ever repeated to him, and the speaker is seldom animated by any audience. Under such circumstances, it is won-

derful into how small a space even an important and difficult discussion is often compressed."

The general result is, that the Master's private labours far exceed his public ones; and, on the average, it is computed that two hours a day employed in actually hearing parties, would require more than four other hours employed in reading and writing, and so in proportion.

The third alleged peculiarity is, that the suitor himself fixes the time when he shall be heard. Any party may take out a warrant, summoning the other party to meet him before the Master for an hour, an half-hour, or a quarter of an hour; and then keep or neglect the appointment as he likes:

"It not unfrequently happens, that of the warrants taken out for a whole day, not one is attended. I do not believe that, at an average, more than four out of five are attended by the solicitors, and not more than two out of four by the counsel, who have been engaged. It has been said, in a tone of quasi-complaint, 'And the Master does not interfere.' The Master must earnestly wish that he could effectually interfere, for he is the principal sufferer. After having got up the case, he has to dismiss it from his memory, and perhaps, a fortnight after, to repeat the whole labour with no better result. But how is he to interfere? He cannot punish the defaulter by striking the case out of his paper, since in three or four days it can re-appear there. He may, it is true, if one party attends, proceed *ex parte*, with the certainty that the defaulter will apply for a warrant to review his decision, and that the result may be, three discussions instead of one. He may, indeed, refuse to grant the warrant to review, and often is bound to do so; but he cannot prevent the matter from being re-opened, on objections to his report, at a far more inconvenient stage of the proceedings."

The power of proceeding *ex parte*, however, is generally precluded by an arrangement between the solicitors. *Veniam petimusque damusque vicissim:* it is not gentlemanly practice to be strict; and when there are so many Masters sitting at once, a solicitor has always a plausible apology. Indeed this, in the writer's opinion, forms a sufficient ground for leaving matters in this respect as they stand. "If the practice in the Master's office resembled that of the superior courts, and the Master fixed the time of hearing, the presence of the same solicitor, at the same hour, would often be required by

different Masters." The reason is not conclusive; for the same inconvenience must be constantly arising in the other courts where attornies in large practice are employed; and surely a summons, or warrant, may be attended by a clerk. It is also urged, that, if the practice of having a paper of causes, calling them on in succession, and striking out those that were not attended,—were pursued, all the solicitors would be under the necessity of attending from the first. But so they are in the other courts, and no one complains of the inconvenience, because it is felt to be indispensable to the due dispatch of business. At all events, let it be made to appear that the solicitor is *bonâ fide* attending in another office; and let defaulters, without cause, be punished by costs.

The writer makes the following application of his statements:

"I have gone through this long detail as a proof of the proposition with which I set out, that to give much additional publicity to the Master's duties, however desirable—and no one desires it more than I do—is impracticable. It has been proposed that they should sit in public. I hold that the Master's court is public, and that any one may come there who does not interrupt the proceedings. But who would attend a court to witness such proceedings as I have been describing? Who would waste his time looking at the Master silently reading his papers, or settling his reports? What would a student or a reporter learn by hearing a Master say, at twelve, to one party, 'I allow this state of facts;' at half-past twelve, to another, 'I think this pedigree made out, except as to the marriage of A. B.;' and at one, to a third, 'I have settled these conditions of sale?' The subjects that come before the Masters have been described as utterly unattractive: they would certainly be uninteresting to a bystander, even if they were transacted in an intelligible manner. Those who talk of their being honoured by an audience cannot know, or must forget, the nature of their ordinary business."

To obviate some of these objections it has been proposed that the number of Masters should be reduced. To this the direct answer would be, that an inferior number would not be equal to the work; but this writer prefers giving an indirect answer,—to the effect that the amount of business is exceedingly variable:

"During Michaelmas Term, and from thence until Christmas, is

the least occupied period; after Christmas the business increases, until the approach of the assizes, when it again diminishes. From the beginning of Easter Term until towards the end of July it goes on augmenting, June and the first three weeks in July being generally the busiest parts of the whole year. Towards the beginning of August it subsides, except as respects the taxation of costs, which is almost the only business brought before a Master after the two or three first days of August. It must be obvious, therefore, that if the number of Masters were exactly proportioned to the business during November and December, they would be unequal to that of January, February and March, and still more unequal to that of the subsequent months."

But what occasions this variation? Why it is almost exclusively occasioned by the practitioners; for chancery suits, like rabbits, breed equally well at all periods of the year; and it is preposterous to say that an undue proportion of public officers are to be kept up because it is the habit of certain members of the profession to procrastinate.

A curious case is then given, to show that the nature of the question, or the conduct of the parties, may make a single cause occupy as much time as a hundred others. There is nothing new in this discovery, and we do not see its precise bearing on the argument: but we quote the facts for another purpose—to illustrate Lord Mansfield's doctrine, that "a man who is his own lawyer has a fool for his client."

"I once had an opportunity of watching the progress of a single redemption suit, which occupied the Master's time for several hours a week during more than a year. The mortgagor was an obstinate, clever, illiterate farmer; the mortgagee had been some years in possession, and claimed considerable sums for costs and for necessary repairs and permanent improvements. First came the question of principal and interest; and the plaintiff tried to prove partial repayment of principal, and an agreement for reduction of interest. Then came the discussion as to the mortgagee's receipts, and affidavits were poured in to show the productiveness of the estate, and the vast profits which must have accrued to the mortgagee in possession. The plaintiff's magazine of evidence seemed inexhaustible. In a few months he tired out his solicitor, and was left to attend in person. He was never satisfied with the Master's assurance that he had read the affidavits, but chose always to read them at full length at the hearing, with the degree of rapidity that might be expected from a farmer not very familiar with writing or reading, and

with a running commentary more diffuse than the text. Then followed the mortgagee's costs, some of which had been incurred in defending the title against collusive claims on the part of the mortgagor's sons. This battle he fought with equal, perhaps with still greater pertinacity, and the long vacation arrived before its conclusion. He refused to proceed before the vacation Master, so that on the Master's return he found the suit where he had left it, except that the autumnal storms had destroyed some buildings, and forced an expenditure on the repair of others. The costs were in time got through, and the great question of the suit was reached, the expenditure by the mortgagee in repairs and improvements. He had found the greater part of the outbuildings ruinous, and, instead of restoring them, had pulled them down, and built others on a different plan and in different situations. The mortgagor maintained that every expenditure was a job, every change an injury, and every supposed improvement a waste. Plans and estimates and affidavits, from farmers and land-agents and builders, kept accumulating from week to week, and the Master's attempts to stop them, by limiting periods within which affidavits on given questions should cease to be brought in, except in reply to new matter, consumed, in the discussion of what was new matter, more time than they saved. One great grievance was an alteration of a pond. The cattle had been accustomed to drink from one into which all the soil from the farmyard emptied itself. The mortgagee turned the old pond into a drain, and substituted one fed by a spring. Week after week was spent by the mortgagor in reading affidavits, that water impregnated with manure is the wholesomest drink for cattle. With respect to this pond, and, I am inclined to think, with respect to every other expenditure that came in question, more time and more money were spent in questioning and defending them than in making them. At length every question was decided, every expenditure by the mortgagee allowed, disallowed, or modified, and the draft of the report prepared. The plaintiff then proceeded to leave objections to the draft of the report; they were brought in ten or twenty at a time, and fourteen or fifteen of them after the period for leaving objections had elapsed. A fortnight was spent in arguing whether the Master was right in refusing to receive the latter. Every question that had been decided against the plaintiff was then re-opened and re-argued before the objections could be disallowed and the report signed; and when the objections, in their subsequent form of exceptions to the report, had been overruled with costs, and the costs came back to be taxed, fresh contests arose on their taxation.

"I have told this long story to show that it is impossible, by any

selection of references, to apportion the business equally between the different offices."

But does it follow that, to anticipate such contingencies, each Master should be allowed spare time enough to dispose of such a cause when it is allotted to him? Are the present Masters underworked? or do they discharge duties which an inferior class of officers might perform? These are the essential points. Mr. Pemberton thinks they do discharge such duties; and this writer grapples with him upon the point.

"After stating that there is no comparison between the duties of a judge in the superior courts of equity and of a Master, and that to do his duty properly a judge may perhaps be obliged to bestow as much time upon a case out of court as in it (an obligation, as I have already shown, still more incidental to a Master), Mr. Pemberton goes on to say, 'The Masters' duties are of a far different character: the far greater part consist of matters which require no mental effort at all—involve no doubt or difficulty. *So much, indeed, is this the case, that a large proportion of the reports is, I believe, prepared by the Masters' clerks.*'

"Now, a report is a mere statement of a conclusion; and because it may be easy to express the statement, Mr. Pemberton infers that it required no mental effort to arrive at the conclusion. With equal accuracy I might say, 'The Lord Chancellor's duties are of a different kind: the far greater part of them consist of matters which require no mental effort at all—involve no doubt or difficulty. *So much, indeed, is this the case, that a large proportion of the decrees is, I believe, prepared by the registrar.*'

"If the Master is asked whether it is fit and proper to do a thing, he replies, 'I find that it is fit and proper,' or 'that it is not fit and proper.' To form the conclusion may have taken hours or days; to state it requires the time necessary to write five lines. In the long foreclosure suit which I have mentioned, the report contained scarcely anything but an enumeration of affidavits; the findings, or, in other words, the statement of the conclusions, did not take half a page. A discussion of six months produced only these words, 'And I find that the said defendant has properly employed on repairs and lasting improvements on the premises in the bill mentioned the sum of £. A., the particulars of which are contained in the schedule to my report.' And, from the unquestionable fact that it was the clerk who expanded into these words the memorandum endorsed by the Master on the defendant's charge, Mr. Pemberton infers that 'the matter

submitted to the Master required no mental effort at all—involved no doubt or difficulty.'"

A sketch of the duties which now devolve upon the chief clerks, shows that these are both laborious and responsible, and could not with propriety be increased. As to the amount of business it is added:

"It must be recollected that the additional powers and duties given to the Masters by the New Orders, and by the 3 & 4 Will. IV. cap. 94, have considerably increased the business of their offices. I find by the return of Mr. Hough, chief clerk to Mr. Trower, made to the Chancery Commissioners in 1824, that the average annual number of reports and certificates signed by Mr. Trower was 371. The number signed by Mr. Senior, Mr. Trower's successor, in the year ending last Michaelmas, was 584. The number of reports and certificates signed is not a perfectly accurate test of the business of an office, but it is the best test that I know of; measured by this standard, the business of that office has increased since the year 1824 more than 57 per cent. If each Master had two chief clerks, he certainly would be able to get through more business in a given time. A man endued with the untiring mental and corporeal vigour enjoyed by Lord Brougham, or Lord Cottenham, or Sir Edward Sugden, might, perhaps, with such assistance be able to do twice as much as the average business of a single office. But such powers are among the rarest human felicities. They depend on the union of a peculiarly happy constitution of mind and body, with a peculiarly fortunate education. The public has a right to require that the Masters shall be men of eminence, but must not expect them to be men of genius."

Another statement made by Mr. Pemberton appears to have excited the ire of the Masters in no common degree. He spoke of twelve months as the shortest time within which a report can be obtained in a matter on which there is neither doubt nor dispute; and the writer says: "I believe there is no office in Southampton Buildings from which a report on such a matter might not be obtained in ten days." He appeals to the parliamentary returns in 1840, showing that in *two* offices (Mr. Senior's and Mr. Lynch's) a large proportion of the matters referred, were referred and reported on in the course of the same legal year. He is silent as to the corresponding returns from the other offices; and as to the returns of the hours of

attendance, he dismisses them, as entirely useless, on the ground already intimated, that the larger half of a Master's labours are (or may be) discharged at home.

"It is among the Master's duties to give to the suitors every instant that they require, to see that his own convenience never interferes with theirs; to sacrifice every pursuit of his own, however important he may think it, to their accommodation; and to spare no time and no labour that can contribute to his deciding justly between litigating parties, and protecting and promoting the interests of the defenceless and the unrepresented. But if he has done all this; if no solicitor can complain that he has been refused an appointment, unless for a pre-engaged hour, or that he has found the Master unacquainted with the facts, or unwilling to listen to his reasonings, or to encounter the labour of deciding; if no ward can say that he should have had a better guardian, or a better education, or a better property, if the Master had given more attention to his case; if the Master has sanctioned no job which greater vigilance might have detected, and delayed no report which greater exertion might have accelerated; he has been diligent, whether he have spent within the walls of his office four hours a day or six. To try him by any other standard is childishness or malice."

Mr. Pemberton complains that the Masters rise with the Court at the commencement of the long vacation. The writer says: "Of course Mr. Pemberton was not aware when he sent this passage to the printer, that, for the express purpose of preventing such inconveniences, one Master is constantly attendant during the whole vacation." Probably Mr. Pemberton was aware of the circumstance, but thought that one Master was not enough to give effect to the orders made towards the conclusion of the sittings. It does not follow that Mr. Pemberton wishes all of them to stay in town during the whole vacation. He objects simply to "the early closing of their offices," and therefore it was hardly fair to level the following forcible and otherwise just passage against him:

"If a subsequent suggestion of Mr. Pemberton's were adopted, and the Masters were detained after the Court had risen, he would have ruined, indeed, the comfort and health of the Masters, but not benefited the public.

"In fact, he would have injured the public, for he would have rendered it impossible, except at a very great increase of salary, to

induce fit persons to accept the office. *There is, perhaps, some difficulty now. The salary has been reduced below the receipts of a barrister in full practice, and does not increase, and at the same time the expense attending a Master's station is necessarily greater than need be borne by a barrister.* No man with a family can save from his salary; no man, therefore, in full business, with a family, can venture to accept the office unless he have an independent fortune. Mr. Pemberton describes the duties of the office as irksome, and the subjects that come before the Master as utterly unattractive. I readily believe that they must be dull to persons accustomed to the fierce contests of the bar. But how will you obtain eminent men to fill an office of moderate remuneration, without prospect of advancement, and with duties generally uninteresting, if you inflict on them the hardship of confining them in London for a longer period than is required from the bar or from the court? And what would render such a confinement more grating would be its uselessness. Any inconvenience can be borne if its expediency be manifest; but to be sacrificed to the vulgar jealousy and dislike which is always directed against public officers; to be teased in order that it may appear that you earn your salary dearly; this is a persecution which it is difficult to bear with temper. I do not mean to say that the number of candidates for Masterships would be diminished; I am inclined to think that it would be increased. And if the Masters were required to attend every day throughout the year for a salary of 500*l.* a year, I have no doubt that there would be ten times as many candidates for the office as there are now. The only difference would be, that they would be of a different class. Every thing that degrades an office increases the competition for it, by letting in a lower and larger class of competitors, who were never heard of until the removal of the higher class emboldened them to come forward. If to under-pay public officers be folly, to annoy them uselessly is still greater folly, for it produces all the evils of underpayment, without the economy."

Cobbett offered to do the duty of prime minister for 500*l.* a year; and this writer is quite right in saying that, reduce the salary as you like, there will be no want of candidates. But it is going a little too far the other way to intimate that the present salary is not sufficient to induce fit persons to accept the office. We should like to know how many of the present Masters ever made 2500*l.* a year by their practice, or had a hope of making it on an average of years? Those who did make

that income must have worked hard for it. "I know something of chancery drawing (says Mr. Pemberton), and I will engage to say that no man can make by it 2500*l.* a year without a very different expenditure of time and labour from that which is described in any of these returns." The same remark applies to conveyancing. Such an income may not tempt the five or six leaders of the equity bar for the time being, but there are plenty of good men whom it will tempt, and no Chancellor need ever find himself at a loss when the Premier calls on him for a recommendation. As to the expense attending a Master's station, we were not aware till now that there was any pomp or circumstance connected with it. Our conception of a Master resembled Crambe's abstract conception of a Lord Mayor. He was present to our mind's eye without furred gown, gold chain, or ceremonial appendage of any sort. The truth is, the bar have contracted a habit of pitching their expectations too high. A general or an admiral thinks himself lucky when he gets a government at one of the extreme ends of the globe with a salary of a thousand or two a year. A barrister of eight or ten years' standing, of moderate capacity and decent character, thinks it *infra dig.* to become a police magistrate, and just condescends to accept a judgeship in the colonies with a salary of four or five thousand a year and a retiring pension in prospect.

Having, as he conceives, repelled these unjust or exaggerated charges, the writer proceeds to suggest improvements.

The first suggestion is, that the suitor should have the choice of the Master, except in questions of procedure. This, it is alleged, would stimulate the body by giving a fresh motive for exertion, and also afford the public some measure of their ability; but how are the public to judge, unless they can be induced to attend? There may be many reasons for going before a particular judge independently of his talents, learning, or impartiality. Moreover, it strikes us that some offices would soon be overloaded, and others without any thing to do; nor do we see how this suggestion is to be reconciled with the answer given to the proposition for a reduction in the number of Masters—we mean, that founded on the varying character of the business. It would then vary more.

As ancillary to this suggestion, it is suggested that the tax-

ation of costs shall be transferred to another set of officers, and that the Master's, as well as the chief clerk's, income shall be dependent on the quantity of work done by them.

It is further proposed—1. That exceptions to a Master's report (except as to procedure) shall be referred to a second Master, and that his decision shall be final, if he concurs with the first; so that no exceptions would be taken before the court unless the Masters disagreed.

2. That, when practicable, the court, in dealing with exceptions, shall embody its opinion in a decree, instead of sending instructions to the Master to return a given report.

3. That the lists which, under the act of 1833, the Masters are required to make of matters pending in their offices, should express the date of the last proceeding in each matter, be made biennially instead of annually, and be inserted in the Gazette or some paper of larger circulation. "The constantly recurring publication of such a list would be a notice to the suitors whose interests were neglected by their solicitors." This suggestion is followed by a passage proving that a large portion of this apparent negligence arises from irremediable causes:

"Many of the inquiries referred to the Master are expensive; many of the claimants are poor. A boy walks up from Wales to London, accumulates, during a long and obscure life, real and personal property, and is cruel enough to bequeath it to the heirs at law and next of kin of his grandfather. The court refers it to the Master, to inquire and state who are the heirs and next of kin; and he requires, by advertisement, all those claiming to be heirs at law or next of kin of John Hughes, of Swansea, mariner, who is supposed to have died in 1740, to come before him, and prove their kindred. As the poor far outnumber the rich, it will be found, on almost every inquiry as to the representatives of a person long since deceased, that all or the large majority of the persons who believe themselves entitled are in humble circumstances; many cannot bear the expense of carrying on, with professional assistance, a long pedigree inquiry; others are unwilling to risk what may be, to them, a very large sum for a chance; and some lie by, in the hope that persons claiming through the same ancestor as themselves, or having the same interest in proving the failure of a particular line, may be tired into bearing the whole expense."

4. That the Master should have the power of directing any

evidence he may deem necessary to be obtained, and that some original jurisdiction (as petitions of reference) might be advantageously conferred on him. His presence, for the purpose of signing fiats and jurats, is deemed unnecessary, though the degree in which this interferes with other duties is said to be greatly exaggerated; and the chambers at present occupied by the Masters in Southampton Buildings are described as incommodious and unsafe:

"It appears to me, that the least accommodation for each office that would be sufficient would consist of four large rooms, one for the Master, two for his clerks, and one (as secure against fire as possible) to serve as a depository for documents, and a place for their inspection. If the plan of building new courts in Lincoln's-Inn Fields be adopted, of course new chambers for the Masters might form part of them. If that be abandoned, perhaps the best plan would be to have the whole of the Chancery offices transferred to the neighbourhood of Westminster Hall, and the Chancery Courts established there during the sittings out of term. The whole business of the Courts of Equity, of the House of Lords, and of the Privy Council, would then be transacted in the same neighbourhood."

In conclusion, the author stoutly contends that any sweeping alteration of the kind suggested by Mr. Pemberton would be impolitic:

"I recommend no such alteration. I believe that it would be a great public misfortune. I believe that there is no English court which affords such facilities for the discovery of truth, and for the cheap and expeditious administration of equity, as the Master's office."

The grounds on which this startling opinion is based are pretty nearly such as Mr. Bentham would have urged in favour of what he called a domestic tribunal—that the judge "sits as the representative of justice unincumbered by form," and that all sorts of evidence are open to him.

"In other courts years elapse before the suitor can attract the Judge's attention. The cause, after it has become ripe for hearing, has to work its way up through stratum after stratum of other causes equally mature. As it approaches to the top, the solicitor and counsel must sit perhaps day after day, watching to seize it at the moment of its emersion, or it will re-descend into the unheard

mass beneath. In the Master's office the suitor himself fixes the day, the hour, and even the minute at which he shall be heard. If he has failed to attend at the appointed time, he may demand another hearing, at three days' notice. If only a portion of his case is ready, he may get that portion separately disposed of. In the superior courts the solicitor cannot forward his client's cause by exertion, though he may indefinitely retard it by neglect. In the Master's office the client, as far as the Master is concerned, has the full benefit of his solicitor's diligence, and suffers as little as it is possible from his negligence.

"Again, in other courts the suitor, unless he plead in person, can be heard only through the intervention of his counsel, and at an expense proportioned to the rank of the agent whom he is forced to employ. In the Master's offices the suitor's representative need not be a barrister, or even a solicitor. The majority of the persons who appear as agents before him are neither the one nor the other."

Then what becomes of the argument that appointments cannot be made peremptory, because solicitors may not be able to attend? and why have we been considering how the solicitors are to be accelerated, if they do not abuse the privilege of fixing their own attendances? The writer proves too much. His mode of accounting for a portion of the Master's unpopularity is much more effective:

"But I may be asked, if the Master's office is so excellent a court, how do I account for the fact that, to use Mr. Pemberton's words, 'it is impossible to deny that it is against their office more than any other that the opinion of the profession is directed?' It is possible to deny this, and I do deny it; I think better of the profession; I think better of their candour, and of their justice. Some of them, as is the case with all large bodies, may be deficient in one of these qualities, or even in both; but I do not think that they generally condemn without inquiry, and I am sure that in the present case, those who inquire are unable to condemn. It is obvious, however, that there are some minds strongly prejudiced against the Masters, and I will endeavour to explain the origin of such prejudices.

"The first and great cause is the general ignorance respecting their proceedings—an ignorance which, I fear, is irremediable, since it arises from the uninteresting and almost domestic nature of their functions. This ignorance is always the protector of misrepresentation, and often directly occasions it. A solicitor who is accused, or who fears to be accused, by his client of negligence or of

dishonest procrastination, finds no excuse so easy as to throw the blame on 'delays in the Master's office.' The client has no means of testing the excuse, and attributes to the Master a delay which he may have used his utmost energy to prevent."

"Another source of unpopularity is the invidious nature of a large portion of the Master's duties. He is, as I have already stated, the protector of the absent, of the unascertained, of the unrepresented, and of the defenceless; but he must not look to them for gratitude or defence; they are never likely to be even aware of the services which he has rendered to them. On the other hand, every solicitor whose bill he has cut down; every surveyor, or committee or receiver, whose job he has defeated, or whose neglect he has punished; every tenant in possession whom he has prevented from injuring his successors; even those whose claims he has admitted, or whose proposals he has approved, if they think that his requisition of evidence has put them to unnecessary trouble or expense,—all these parties think themselves ill-used, vent their ill temper by complaining of the tribunal, and each in his own circle is believed.

"The Masters have also to contend with a traditional unpopularity. There was a time when their incomes were very large, and were chiefly derived from the gross, though long sanctioned, abuse of copy-money; and there was a time much more remote, when the Masterships were considered a part of the private patronage of the Lord Chancellor. There was a time, indeed, within the last century, when they were sold by him. The Masters were considered as a sort of favourites of the Great Seal, enjoying large and undue emoluments in the shadow of their great protector. They thus became the objects of a jealousy which has not perhaps quite ceased with its causes."

So long as any of them are created by Prime Ministers, by way of reward for party services, they will still remain legitimate objects of jealousy. The four or five last appointments, however, are certainly not open to reproach.

H.

M. BERRYER'S REMINISCENCES OF THE FRENCH BAR (*continued*).

ART. IX.—*Souvenirs de M. Berryer, Doyen des Avocats de Paris, de* 1774 *à* 1838. Deux Volumes. Paris, 1839.

THE strictly biographical part of this work terminated with the first volume. The second, containing an account of the principal causes in which the author has been engaged, may be regarded as a sort of supplement to the famous *Causes Célébres*. But it abounds in personal details, and, from the magnitude of the interests intrusted to M. Berryer's advocacy, it throws nearly as much light on the history of the period as the first; besides presenting still more curious points of contrast and matters for comparison with our own judicial system and forensic institutions. The author had, moreover, a habit which will astonish the leaders of our bar. When the course of his practice was of a nature to elucidate the defects of the existing law, he generally drew up a memoir, and formally brought the subject under the consideration of the authorities. This habit gives breadth to his arguments on the individual cases, and renders them as interesting to the general jurist as to the mere French lawyer.

"The gallery," as he justly says in his preface, "which I throw open, is imposing; in the first row, will be found the law of nations, developed for the maintenance of a good understanding between people and people; in the second, the public law of France with regard to foreigners residing or forming engagements within her territory; then, with regard to the subjects of different nations between one another, on the multifarious questions of arrest, offences by sea or land, the validity or invalidity of marriages, the legitimacy of children, the capacity or incapacity of bastards to inherit: finally, in the vast circle of private interests, the disputes arising from emigration, the claims on domains or titles, theatrical matters, those of the most celebrated trades-people, the gamblings of the Bourse (stock-jobbing), bankruptcies, bills of exchange, trusts, literary property, &c. &c. The singularity, the prodigious variety of the facts, from which the conclusions are here elicited, compose a kind of panorama interesting to all classes of readers."

It is not in our power to convey a full impression of this variety, but we will make as good a selection as we can.

The rights of neuter vessels in time of war form the subject of the first chapter, and, with all M. Berryer's clearness of explanation, it is one as to which we find it difficult to make up our minds definitively. At the first blush, it certainly does seem as if Great Britain had acted a little too much on the maxim of *might makes right;* and our only comfort is, that other nations have generally done the same when a favourable opportunity was afforded them. The right of search is clearly of modern origin. The ancients knew nothing of it; indeed, considering the very limited scope of navigation, it would be strange if they did; and the famous Consulate of the Sea[1] provided in effect that the flag covered the merchandize. It also enacts that, though the ship might be lawful prize, the cargo, if belonging to a neuter, should be restored. M. Berryer charges England with being the first to disregard the authority of these rules, but he forgets to add, that her naval supremacy entirely depended on her doing so, and that she has invariably confined her alleged infractions to cases where an equally valuable principle was involved. If neutrals lend out their vessels for an enemy's service, they may fairly be regarded as aiders and abettors of the war.

But we were not alone, so long as the empire of the seas was at all doubtful. Louis XIV. decreed, in 1681, that all goods found in an enemy's ship were liable to confiscation. At a later period (1778) Louis XVI. abolished this decree, but this was when his subjects were beginning to get the worst of it in a contest of reprisals, and to the same cause may be attributed the famous armed neutrality, in which Catherine of Russia took the lead. She was joined by all the other great powers of Europe, as well as by the United States of America, but England gallantly held on her course, and maintained the right in question to this hour; but she has exercised it with moderation, and her courts are renowned all over the civilized world for the stern uncompromising impartiality with which they have arbitrated between foreign claimants and their countrymen.

It was reserved for the French republic to excite universal indignation by the robber-like clutch they laid on the property

[1] *Consolat de Mar.*—The principal edition is in Catalonian, and bears date of the year 1494. See ante, Art. VI. as to the Dominion of the Seas.

of their friends and allies, under pretences known to all Europe to be false. At peace and bound by treaties with Denmark, Sweden, the United States, Venice, Genoa, and the Hanseatic Towns, they boarded the vessels of these states wherever they could encounter them. "In the peaceable mariners that they diverted from their course," says M. Berryer, "they saw only enemies in disguise, and in case of mistake, only a single inconvenience,—that of having purely and simply to let go those of their captures who might not be declared lawful prize.

"In less than six years (he continues) I have had to contend against more than three hundred of these stoppages of neutrals, all on grounds of the highest importance. It would be difficult to believe in what a condition the captains of these neuter vessels reached me. They had been plundered of everything, even of the smallest objects of their personal property, by the privateers. They presented themselves in my cabinet, stick in hand,—they who had just been conveying millions left in the power of the capturers; they appeared before me in such a state of penury that I was most frequently obliged to accredit them with the consuls of their nation, that they might have enough to satisfy their most pressing wants, in consideration of the valuables they had to claim."

Their chances of redress were very slender, for the decision of such cases was left to the courts of commerce, then filled by men ignorant of the first principles of public law, or to the French consuls at foreign ports, subject to appeal to four French tribunals, who generally contrived to wear out the claimant by delay.

"Contemptible objections were raised, always with success, by the privateers against the various documents proving the neutrality of the property,—onewhile of the vessels, by certificates of origin, construction, and distinction,—onewhile of the cargoes, by manifests, acknowledgments, and invoices. Above all, they fell furiously on the passports, disputing every syllable; or on the bills of lading, in which the least change in the course of long voyages was transformed into a crime. In the end, matters came to such a pass, that, in law and before the tribunals, not a single vessel truly neuter was to be found on the vast surface of the ocean,—that all were sailing on account of the English, under the shadow of a fraudulently simulated neutrality. This interested assertion of the

privateers, hyperbolical as it was, passed current; almost all the neuter property seized by them was uniformly declared lawful prize and confiscated. A law of the year 6 gave the finishing touch to the system: every vessel found at sea, laden wholly or *in part* with merchandize from England or her possessions, was declared good prize, be the proprietor who he might."

Dating from this law, the licence of the capturers knew no bounds: they stopped, without exception, every vessel they encountered, whatever the flag; certain as they were of being able to prove that there was some article from England or her possessions on board. They took no account of the usual signification of the word *merchandize*, which meant one package at least consigned for commercial purposes. They treated as English merchandize found on board, any species of movable object—even furniture, such as beds, chairs, carpets and utensils, knives, razors, &c.—which might have been fabricated in England; and they argued from this infringement, accidental and trifling as it was, that the confiscation of the ship and all its cargo must ensue, whatever their value.

A ship belonging to the United States, called the Federalist, was confiscated because an old piece of carpet, alleged to be of English manufacture, was found in the captain's cabin at the foot of his bed. This vessel with its cargo was valued at £60,000 sterling. The question came before the Court of Cassation, and M. Berryer says he was on the point of getting a decision in the owner's favour, when the sitting was adjourned. The day following, the judgment of confiscation was confirmed. The secret of this sudden change was an order from the Council of Five Hundred, doubtless obtained by sacrificing a share of the plunder.

Occurrences of this sort were frequent. M. Berryer says that on one occasion he observed a person, whom he recognized as a deputy, with his elbows resting on the back of the seat where the government commissary was seated. The deputy leant over, whispered something in the commissary's ear, and put a paper into his hands. M. Berryer darted towards the spot, and murmured audibly: *Solitaire, rime à corsaire.* In another moment the deputy was gone, but the paper, an order from the council, decided the case against the ship-owner.

In the course of these transactions M. Berryer was more

than once taken down (as we should say, *special*) to Nantes, and such was the respect entertained amongst the privateers of that place for his abilities, that in one instance they formed a plan for carrying him off, which was only frustrated by accident. This may remind our readers of a trick played off on an influential portion of the constituency of a Cornish borough by the eccentric Lord Camelford. Pretending to give up the contest, he invited his principal opponents to an entertainment on board his ship, and then set sail with them on a cruise. A member of the Delaval family did something of the same sort at Berwick.

M. Berryer had a curious compliment paid him at Nantes: "A huge Vendean peasant, who had attended during the whole of my speech, waited for me at the door of the hall, and, when I appeared, he stretched out both his arms in front of me, and exclaimed to his companions: *Tiens, le v' là sti-la qu'a parlé quatre heures sans tousser, ni moucher, ni cracher.*[1]"

The natural consequence of this system of piracy (it deserves no better name) was the entire desertion of the French ports by neuters; a few privateers gained enormous fortunes, but the country at large suffered greatly; entire classes of producers could find no vent for their commodities; and the price of colonial produce rose to such a height as to amount to a positive prohibition to the majority. The Directory at length became aware of the folly, to say nothing of the wickedness, of such a course; and some slight advance towards a remedy was attempted by the transfer of the jurisdiction over prize cases, from the ordinary courts to one entitled the *Conseil Special des Prises.* But it would seem from the fate of the Caninholm, that there was still as little chance as ever for those who were rich enough to tempt the higher order of plunderers.

The Caninholm was fitted out by the Batavian republic to make the Chinese voyage and bring home a cargo of tea, the scarcity of which was an infliction of the most crying kind to the Dutch. M. de Tocqueville considers the resolution entered into by the people of the United States of America to forego the use of tea rather than pay the tax upon it in 1767, as one of the greatest sacrifices ever made by a

[1] "See, there is a man who has spoken four hours without coughing, or blowing his nose, or spitting."

people to liberty; and the Dutch were naturally enough unwilling to make the sacrifice without an equivalent. Accordingly a vessel was to be fitted out, and all possible precautions taken to preserve her both from the cruisers of England and the pirates of France. To mislead the English, the vessel was procured from England, and the property in her formally vested in a Dane,—Denmark being the only country to which the privilege of trading with the East Indies was accorded at the time. To guard against French aggression, the Batavian republic applied directly to the French (their dear friends and allies) for a safe-conduct, which was granted. The ship sailed, arrived safe in China, took in a cargo valued at nearly nine millions of francs (£360,000), and was on her return, when she was captured by a privateer belonging to a company of private traders of Bourdeaux. Unfortunately, the Directory, which had given the safe-conduct, was no longer in existence, and the government for the time being chose to consider it as an infringement on the law. Acceptances to a large amount (£20,000 at least) in the names of the proprietors of the privateer, which were found circulating at the time, are supposed to have had some influence; but be this as it may, the government refused to interfere: the courts decided that the vessel, being of English build and procured from England for the express purpose of the voyage, afforded ample grounds of confiscation; the prize was declared lawful, and the Dutch were left sighing for their tea.

M. Berryer draws a striking contrast between the losses experienced by France, and the advantages derived by England, from their respective maritime exertions:

"The French privateers scattered over the sea with the sole object of plundering neutrals, acting without plan or leader, were constantly incurring the risk of falling into the hands of the English cruisers. Numerous crews were necessarily made prisoners and taken into the English ports, where they were heaped together pell mell, in hulks; they were treated excessively ill in them, and a great number died."[1]

"When the exchange of prisoners took place under the consulate, there was an excess of seventeen thousand French

[1] A play was lately announced in Paris, entitled *Les Pontons Anglais*, founded on this notion. The government interfered, and the scene was transferred to Cadiz, the Spaniards not being in a condition to remonstrate.

sailors, over and above those who were exchanged. To this enormous deficiency must be attributed the prejudice conceived by the First Consul against maritime expeditions, the little favour he accorded to them, and above all his refusal to lend himself to the proposition made to him, to fit out armaments on a great scale specially destined for the Indian seas, where they might make themselves masters of the richly-laden homeward-bound English vessels, which would have struck England to the heart and ruined her commerce.[1] As his sole answer to this project, Bonaparte pointed to the seventeen thousand French seamen detained in English prisons, and asked where he was to get the sailors required for the military marine."

We do not see how he could well give a better answer. Instead of seizing our richest ships and thus striking us to the heart, why not seize London, and burn it to the ground?

Let us now reverse the picture:

"More fortunate in her combinations, England has succeeded in making the prolongation of the war contribute to the aggrandizement of her power. In point of fact she has exercised an almost exclusive empire over the seas during nearly twenty years. She has made herself mistress of all the points of the globe which it was most important for her, in a commercial point of view, to occupy. In speculations of detail, the invention of individuals has been exercised in all the scope which cupidity can confer. It is thus, for example, that assurers have admitted amongst the number of chances from which they could guarantee neutrals, the risks to which these were exposed of being captured by English privateers. So that in the end, it was under the ægis of the same belligerent that the capture and the restitution have taken place. I have seen in the hands of many neuters, policies of assurance which had been made in London, at Lloyd's."

"It has come to pass by another contrivance of this mercantile spirit, so active in England, that entire cargos of English merchandize, the open introduction of which on the continent was prohibited, have been voluntarily exposed to be captured by French privateers, with whom the English

[1] It subsequently (p. 124) appears that this was M. Berryer's own project, and he says it would infallibly have succeeded.

importers were in correspondence. In this manner the tribunals, by which the captures were adjudged, were in reality but the innocent co-operators in a species of indirect smuggling. This contrivance was turned to profit by many even at the period when, as a result of the continental blockade, the expedient of burning all English merchandize was hit upon. It is well known that, even in this case,—foreseen by English intelligence, every precaution was taken so that the loss should fall entirely on the continent. For the English, one mode of consumption was as good as another: their manufacturers were not the less relieved of their excesses of production."

If this be true, Napoleon must have acted like the Irish when they burnt the notes of the Bank of England to ruin it. To the best of our recollection, Swift's advice to his countrymen was, to burn every thing English, except the coals.

M. Berryer records two instances of intrepidity on the part of French privateers, by way of set-off against his praiseworthy exposure of their rapacity:

"Both originated between 1807 and 1810 in the port of Boulogne, *from which it is easy to observe what is passing on the opposite coast of England.*"

"One fine morning, the crew of a privateer of this port perceived on the opposite coast, in a public-house (tabagie), all the festivities of a rural wedding. They instantly formed the project of carrying off the bride and bridegroom, and bringing them to finish their wedding supper at Boulogne. This trick is executed at the risk of being exterminated by the armed vessels with which the English coast is always surrounded in war time."

"The other *coup-de-main* of a Boulogne privateer, at once more daring and most glorious in its result, merits a page in the history of our marine."

"This time it is a large transport sailing in the direction of the Thames, which is perceived from the port of Boulogne. The nature of her cargo is unknown; the captain and crew of the privateer resolve, notwithstanding, to board her without delay. The captain, armed with his boarding hatchet, is the first to throw himself upon the English vessel. What does he see there? a battalion of soldiers, most of them asleep, with

their arms piled upon the deck. By a gesture he summons thirty or forty of his mariners to his side: the piles of arms are secured. Each of the attacking party has a pistol in his hand, and threatens the first of the attacked who shall attempt to stir. Fear holds them back, the privateer being armed to the teeth and showing himself determined to conquer or to die: the English vessel and its military cargo are carried without opposition into the harbour of Boulogne."

It is surprising that a man of M. Berryer's sense should have been induced to give a momentary faith to these narrations. As regards the first, it is simply necessary to refer to the localities. As to the second, does he really suppose that one ship can run on board of another in broad daylight, without a soul in one of them being aware of the circumstance until they touch?—nay, not even then, for it seems that the privateer captain was allowed to take a cool view of his sleeping victims, and then beckon up his comrades, like the brigand captain who steals in on tip-toe in a melodrame. Yet we have not the slightest doubt that these ludicrous absurdities pass current amongst his countrymen as facts.

We shall pass over the chapter on the international law regarding succession, &c. after a single extract, which may prove useful:

"The nationality of origin, the enjoyment of political rights, the locality of the domicile by right, when they are found united in the same individual, draw after them, as consequences allowed by all, the fixation of the place for opening his succession, that of the laws which are to decide his testamentary capacity or incapacity, and that regarding the validity of his dispositions, and the competency of the tribunals to decide upon them. There remain under the power of the territorial law, only the external form of testamentary acts, or (between living parties) the regulations of immovable property within its limits.

"By a notable judgment of 1824, the Court Royal of Paris consecrated all these principles in the case of the testamentary succession of the English Colonel Thornton, domiciliated and holding possessions in France, but who had preserved his English nationality and large property in England. It remitted the settlement of the colonel's testamentary disposi-

tions to the English courts, though Frenchmen were interested in several of them."

The English courts act upon the same principle, but in another particular we are less liberal than our neighbours, who permit foreigners to hold landed property without undergoing the previous ceremony of naturalization. The liability to arrest of foreigners, not possessing real property or a commercial establishment in France, more than counterbalances any other advantages that may have been conferred upon them; for there being no insolvent law or *cessio bonorum* in their case, they may be made to undergo an indefinite period of imprisonment. Lord Mazarine and the American Swan (mentioned in our last Number) are illustrations; though it must be admitted that both richly merited their fate. Swan not only succeeded in ruining most of his creditors by his obstinacy, but actually contrived to get one of them, a countryman, placed alongside of him, and M. Berryer says that he saw them both together in Ste. Pelagie.

The following story is an alleged example of our national mania for betting:

"This abuse (Swan's arrest of his countryman) of the exceptional law of 1807, reminds me of a bet made by two Englishmen during an accidental encounter, which they came to my cabinet to refer to me. One of them owed the other a large sum under a security executed in England. The debtor had come to France expressly to avoid his creditor. The creditor, on the other hand, had passed the frontier for a very different purpose from the recovery of his debt. They meet by accident in the *Rue de la Paix*. They salute one another; a conversation is begun, in the course of which the creditor offers a wager that he will compel payment in France by means of arrest. The debtor defies him, and maintains that the French law does not authorize a personal execution of the kind. *A bet of a dinner is agreed upon.* To put an end to this strange dispute, the two Englishmen agree to decide it by the opinion of the first advocate they can find. I then lived in the *Rue Neuve-Saint-Augustin*, near the *Rue de la Paix*. They enter my cabinet. At the first explanation I decide that the law of 1807 touching foreigners, is not ap-

plicable to a debt contracted out of France for the benefit of others than Frenchmen. The creditor takes fresh ground on the instant, and exclaims, in a tone of inspiration, that he is now sure of his point; that he possesses an infallible mode of legally laying hold of the person of his debtor. He will assign over the debt to a Frenchman, and it will be his French assignee who will obtain the provisory arrest. To this cry of triumph, I quietly object that he is mistaken; that his debt, in the hands of a Frenchman, will not lose its English character, and that, by reason of this origin, the Frenchman himself, though lawful assignee, will inevitably be baffled. My objection quiets him; he admits himself vanquished; *he pays his wager and takes away his debtor to dine with him. They pressed me to be of the party, but I was otherwise engaged.*"

The case of the late Lord Crewe shows the difficulty that notwithstanding remains in the execution of this law. He was arrested by a Frenchman named Brunet, the keeper of a London hotel, on three bills or notes for about £700, drawn in London. It was objected that the security was English, and that Brunet had been naturalized in England by royal letters patent, to which the reply was that these could not destroy his original rights as a French subject. The Court of Cassation (1819) decided in favour of their countryman.

It would seem that age may be a ground of liberation. M. Berryer says that he has known this plea argued for three septuagenarians since 1807.

"The first was an ex-banker and speculator of Brussels, who, before the union of Belgium with France, had fitted out no less than 94 vessels from Ostend, and whose commercial operations by land and by sea were so multiplied, that during one whole year a rich cargo had remained forgotten in the port. From simple factor, he had become one of the richest merchants in Europe; the Emperor of Austria had made him a baron. All of a sudden our invasion of Belgium had ruined him; and he was expiating in Ste. Pelagie the enormous wrong of having saved nothing." He was released.

The second was an ex-commissary, formerly also a millionaire. He too was discharged. The third was a Turk named Passavan Owglon. M. Berryer was not his counsel,

and he failed: his morals are said to have been the cause of his prolonged detention. Considering the period, the objection recalls an entry in Sir James Mackintosh's Paris Diary: "I am told Madame de —— is excluded from society. I really should like to know what her offence can be."

Frenchmen themselves are liable to arrest in respect of commercial transactions. M. Berryer had to defend the director of the Odeon. One Chamber of the Court saw in him only an artist, *metteur en scene*, not within the law; another held him to be an *entrepreneur de spectacle* who had speculated on the produce of the stage. They gave contradictory decisions in the same day.

M. Berryer mentions decisions to the effect that no debtor can be detained above five years, but he does not attempt to reconcile them with the cases of Lord Mazarine and Swan. A person born in China, known as the Chinese prince in Parisian circles, was released upon this ground.

One curious ground of release was discovered by the prisoners themselves. They had observed that the required allowance for keep was only made by their creditors for the republican months, all uniformly consisting of thirty days; that, the Gregorian calendar being re-established, many months were composed of thirty-one days; and that no keep had been allowed for the thirty-first. They commissioned M. Berryer to demand their release for defect of keep. The application was successful, and numbers were liberated accordingly.

In the course of his practice M. Berryer was repeatedly brought into contact with the irritable race of authors, and, according to his own showing, reaped a rich harvest of laurels by his clever defence of André Murville, the dramatist, who, under the notion that the director of the Odeon, M. Duval, had been instrumental in the sudden suppression of his piece (*Heloise*), attacked him furiously in a pamphlet entitled *Les Infiniment Petits*, in which he described the luckless director as a man without education, author and actor *desénfariné du boulevart;* culpably negligent in his duties, lazy, indolent, jealous, envious, &c.

An action of slander being brought, M. Berryer was retained for the defence:

"I felt that it was impossible for me to succeed in the de-

fence of Murville, except by taking the comic line. An incident, flattering for M. Duval, had amply revenged him for the satire of Murville: the French Academy had just admitted him within her bosom. In his inaugural discourse, M. Duval had made the modest avowal that his education had been exceedingly neglected: that it had been his good luck to form himself. I took advantage of this avowal, and also of the definitions of the Academy, which, in its dictionary, marks the difference between the vices and the simple defects of man. I laid down as a principle that the penal code repressed as calumnies only those imputations of pretended facts or determined vices, of a nature to expose the libelled party to hatred or contempt. After which, paraphrasing the imputations of Murville, I said in substance:

"*Man without education!* You make it a title of honour; you are indebted to yourself for your success.

"*Author and actor desenfariné du boulevart!* You have enriched the French stage with charming pieces, which have gained you the academic chair. From *miller* you are become *bishop.*

"*Negligent in your functions!* It is notoriously not on you that the management of the Odeon devolves; you do not press for the reproduction of my Heloise.

"*Idle, indolent!* Horace, Pliny, have praised those who lived in this pleasing habitude; *dulce otium:* it was the disposition of the good La Fontaine. Regnard, our model, has made the eulogium of idleness. La Rochefoucault makes it the appanage of the philosopher.

"*Envious, jealous!* Themistocles was thoroughly so of the success of Miltiades. Jealousy on the part of authors is a proof of emulation. Murville, whom you prosecute after having been the first to depreciate him, has been crowned three times by that same academy which has just granted you the honours of a seat."

The Court (of Correctional Police) decided that they had no jurisdiction over the dispute.

To illustrate a case in which he was engaged regarding a famous sapphire (valued at 12,000*l.*) purchased of an Italian nobleman to whom it had descended as an heir loom, by a French speculator who hoped to make a large profit by selling

it to Napoleon,—M. Berryer relates the history of the great Russian diamond now in the possession of the Czar:

"A Frenchman, slave of the great Mogul in the temple of the Grand Lama, had been struck by the brilliant light which emanated from one of the eyes of the colossal statue of this divinity: he was never weary of admiring it, and in fact admired it so much, that he formed the resolution to possess himself of this radiant eye. One fine night, he hid himself in the temple; by the light of this star, he succeeded in making himself master of it, leaving a piece of crystal in its place. Possessed of the brilliant relic, he bore it far from the place where it was adored, far even from countries of the same faith. He had the tact to bring it, in all safety, under the observation of two Jews, who soon conceived the same devotion for the eye of the Grand Lama as himself. After much bargaining, the two Jews paid the fugitive slave the sum of 30,000 francs (1200*l.*) The two Israelites started without delay for Moscow with their Grand Lama, in the hope of getting a high price for him from the illustrious Catharine. In the end they received more than a million (francs) and a considerable annuity."

For a lawyer versed in evidence, M. Berryer is remarkably credulous. Surely a man—above all, a Frenchman—who had ingenuity enough to get into the temple with his piece of crystal, and out of the country with his eye, would not have permitted himself to be so easily cheated by two Jews. We would also suggest that to say—"a Frenchman, slave to the great Mogul, in the temple of the great Lama," is much the same as saying—"an Englishman, slave to the king of the French, in the palace of the Escurial." To criticism of this sort, however, there is always an answer ready—*c'est égal.*

The uncertainty of public affairs, necessarily reflected upon property, opened an ample field for usurers, and the Jews availed themselves of the opportunity so greedily, that Napoleon was induced to make them the object of a special decree (March 1808), whereby it was provided that all contracts for loans made by Jews with minors, married women or the military, should be absolutely void, and that no Jew should thenceforth gain a domicile under any circumstances in the Rheniah provinces, nor in the other departments, unless he

gave up commerce and devoted himself exclusively to agriculture.

M. Berryer bears willing testimony to the alleged rapacity of this calumniated race, and, jealous of their enormous monied influence, proposes to compel them to invest a portion of their capital in land, and subject them to a property tax. He mentions two cases which simply prove that their mode of dealing is that of money lenders all the world over—one, where a young spendthrift was compelled to take two hundred fir coffins instead of cash; and another, in which a retired dancing-bear was substituted for a portion of the loan. The gay prodigal took down his prize to his father's country-house, where he was about as welcome as Lord Byron's ursine companion amongst the fellows of Trinity.

The Grammont cause is one of the most important to which the confiscation of emigrant or crown property gave rise.

In 1460, Charles VII., to facilitate the re-conquest of Guyenne from the English, contracted with the Dukes of Grammont for the purchase of their castle and estate of Blaye. They were to receive a part of the royal domains in exchange, but in 1585 their claim was commuted for a share of the royal dues on vessels entering Bayonne. In 1784, this port was freed from the dues in question by Louis XVI., who solemnly promised that the Grammont family should be indemnified. The indemnity was settled at 106,000fr. a year in land. Then came the Revolution; the Duke emigrated, and remained abroad during twenty-five years, at the end of which period he returned in the train of the restored Bourbons, and claimed his indemnity. The appeal court of Bourdeaux decided in his favour, but the Court of Cassation held that he was to be regarded as an ordinary state creditor, whose security was gone. The pleading of M. Dalloz for the claimant was universally applauded, and it is difficult to reconcile the judgment of the supreme court with royal or national good faith.

M. Berryer relates that, in 1825, an English gentleman, named Sir John Whitaker, laid claim to the magnificent domain of Rambouillet, on the ground of his being lineally descended from Elizabeth, daughter of the last marquis and male descendant of that house. The property had been confiscated under the edict of Nantes, but the Constituent Assembly had declared that every thing forfeited under that

edict should be restored without regard to prescription. Although the marquisate still formed part of the civil lis' the claim was rejected, as was that of the representatives of the Prince de Conti to the Isle d' Adam; and it must be owned that, judging from these and other cases, the crown does not appear to have been quite so ready to acknowledge ancient rights, as a crown resting on principle and prescriptive authority should have been.

Crescentini, the celebrated singer, had hardly so much reason to complain of the Bourbons, as he suffered from a simple act of tyranny on the part of the Emperor, who, finding him at Vienna in 1805, and regarding him probably in the light of a picture or statue or any other production of art, compelled him to leave his retirement, and sing in the chapel of the Tuileries. A pension of 12,000 fr. was settled on him; but it was stopped on the Restoration, and M. Berryer exerted his ingenuity and eloquence in vain to get it renewed or compel payment of the arrears. In 1821, Crescentini was languishing in the lowest state of destitution at Bologna, but an honourable asylum was afterwards opened to him by the King of Naples.

Perlet and Potier, with various other actors of celebrity, were of the number of M. Berryer's clients, but he has retained nothing very striking regarding them, and we pass on to another class of clients, the jugglers or conjurors of the day.

He relates that the best of these, Comte, was one evening exhibiting at the Tuileries. After fixing the attention of the whole assembly by a trick, he called the attention of a lady in waiting on the dauphiness, to the fact that a brilliant of great value was missing from one of her mistress's earrings. The whole court was in confusion; every corner was searched but in vain; when from one of the corners of the cornice, a canary bird appeared, and flew to perch itself on the shoulder of the dauphiness, with the brilliant in its beak. The performer's dexterity was admired, but the freedom of the feat was condemned as a breach of the *convenances;* and M. Comte found himself much in the situation of Gulliver when he saved the royal palace of Lilliput from the flames.

M. Berryer bears handsome testimony to "the perfect morality" of the Franconi family, the Astleys of France.

Napoleon's generals do not seem to have invariably justified the poetic axiom:

> "Oh, 'tis always the spirit most gallant in war,
> That is fondest and truest in love."

General Lannes, afterwards Duc de Montebello, was privately married to a beautiful woman with whom he was violently in love. Disobeying the express orders of Napoleon, he stole away to pass a few hours with her on the eve of the expedition to Egypt; but the oriental beauties having (according to M. Berryer) erased her image from his heart, he had the effrontery, on his return, to urge these very orders as an argument to prove that the child of which she became pregnant could not be his, since it was impossible for him to be absent from the army at the time. He applied for a divorce on the ground of adultery, and backed by Napoleon's all powerful interest, he succeeded. After the general's death in 1809, M. Berryer was engaged to establish the legitimacy of the child, and he thinks he should have done so, if the process had not been suddenly cut short by the death of the claimant.

Apropos of Napoleon's generals, M. Berryer relates that he was once invited by the mayor of a provincial town to meet ten or a dozen officers of rank (generals of brigade or division) who were accidentally quartered in the neighbourhood. In the course of conversation it transpired that every one of them had risen from the ranks, and commenced with the lowest rong in the military and social ladder.

Conscious of their want of fortune and connection, Napoleon had a mania for allying his marshals and generals with heiresses, and there was no surer mode of forfeiting his favour than to contravene his wishes in this particular. Birth was not enough; money was equally indispensable; and in one instance, a distinguished officer privately conferred a fortune on his intended bride, the scion of a noble house, for the purpose of securing the acquiescence of the Emperor. The marriage took place, but the lady, insensible alike to conjugal affection and gratitude, eventually became ashamed of the *mésalliance*, and applied, in 1815, for a separation, which would have entailed the settlement of her supposed private

fortune on herself. Her application was refused, but the husband's peace was irretrievably ruined, and he terminated his own existence by a pistol-shot.

Occasionally M. Berryer followed his clients to the grave:

"From the mouth of M. Guizot, over his (a client's) tomb at Père-la-chaise, I listened to some simple expressions which poured all the unction of sorrow into my soul. Twenty years afterwards, M. Monnot, Protestant minister, at the same place, agitating a large skin filled with earth from the grave, excited my emotions on the tomb of M. Duntzfeld, who had come to France to save the valuable cargos which I had been unable to wrest from the grasp of the privateers. M. Monnot, *by a sublime apostrophe addresed to the earth in the skin*, charged it to repeat, in Copenhagen, to the posterity of M. Duntzfeld, that it would be always proud (we translate literally) to afford hospitality to his remains."

In reference to a marriage case in which religious feeling had been made to play a prominent part, we are treated to a *bon mot:*

"One of our modern *elegantes* encountering one of her gay male acquaintance on the steps of the church of St. Rock, with a little missal bound in rose colour and gold in her hand, was thus addressed: Eh quoi, Madame, vous aussi. To which she replied: Que voulez-vous, mon cher, autrefois on *servait Dieu*, maintenant on se *sert de Dieu*."

There was no need of the *autrefois*. It was said of the Duchesse de Rochefoucault, *qu'elle se sauvait sur la même planche de l'ennui et de l'enfer;* and of another ex-beauty of the same period, that "she gave herself to God because man would have nothing to do with her."

Entails and testamentary donations clogged with the condition of changing the name, gave rise to many law-suits. Cardinal Mazarin left his enormous property (perhaps the largest ever amassed by a subject) on this condition. Six years prior to the Revolution, the Duchess of Mazarin, the last in the entail, married her only daughter to the Duke of Valentinois, hereditary prince of Monaco, who refused to take the name of Mazarin. In 1791, the creditors of the duchess attempted to enforce the forfeit, but they came

too late; it was held that such conditions were rendered null and void by the decrees of the 4th Aug. 1789, abolishing feudality.

M. Berryer owns, in a true spirit of contrition, that in two instances he has been the innocent cause of hurrying the parties opposed to him to their graves. In the first, the agent of a lady was required to deliver an account. He endeavoured to evade the acquisition. M. Berryer supported it before the court. Within the eight days allowed the agent for his reply, he committed suicide. The agent being also one of the directors of the Vaudeville, his death made some noise, and was laid to M. Berryer's account by the coteries.

In the second, an ex-avoué (attorney) had espoused a great lady, who applied for a divorce on the ground of gross ill-treatment. It was granted, and the ex-avoué followed the example of the director. Again, the entire blame was laid on M. Berryer's shoulders, but (what was hardly necessary for him to add) he was exonerated on both occasions by the opinion of his colleagues of the bar.

In cases of domestic dissension he always made a point of counselling patience and conciliation; but he relates one singular instance in which he had reason to doubt of the prudence of his advice:

"A young woman of great personal attractions, though without fortune, had married a wealthy commissary. The husband, a man of gloomy and severe character, had shut up his wife in a country-house, where she was made to endure all sorts of humiliations. He had even gone the length of striking her before strangers. She applied for a separation, and whilst the result was still uncertain, a reconciliation was brought about at M. Berryer's suggestion. Six weeks after her return to her husband's house, she was no more. The monster had assassinated her, cut her up, and burnt her bit by bit. Astounded by the alarm raised by the maid-servant, who was half suffocated by the infectious fumes, he was unable to give any answer to the inquiries she addressed to him as to her mistress's fate. He ran to hide himself in a piece of water in his garden, his head alone remaining visible. In this state of stupidity he was seized and thrown into the prison of Versailles. I have been informed that one of his

comrades, from *esprit de corps,* induced him to anticipate the condemnation to an ignominious death."

M. Berryer expresses a decided repugnance to advising accused parties to surrender themselves in ignorance of the precise charge. One instance in which he ventured to do so, is well worth mentioning. A nephew had accidentally killed his uncle by a blow with the pointed end of a walking-stick; as soon as he saw what he had done, he mechanically dragged the body by the legs, in broad day-light and in the sight of several neighbours, to a dung-heap, and then ran away. The whole neighbourhood bore testimony to the reciprocal attachment existing between them, and the nephew was acquitted.

The most repulsive of all his clients—and he certainly appears to have had some of every class and profession—were the executioners, but he treated them with politeness, and has already reaped the fruits of his condescension in a way of which he has no reason to be ashamed. Madame Berryer (his wife) was overturned one dark night in the middle of a plain; her servant was unable to lift up the carriage, and she was on the point of setting forth on foot through the mud, when a one-horse chaise drove up, and on her appealing to the occupant for help, a stout man got out, swung her carriage into its right position, and without waiting for thanks drove off again. It was Sanson, the executioner of Paris, who occupied a villa near that of M. Berryer, and had formerly received some obligations from him.

We once knew an elderly gentleman in the West of England, who never passed the hangman of the district without a bow; there was no knowing, he would say, what might happen to any of us; and the late Sir Anthony Hammond used to relate an anecdote touching the worthy who adjusted the noose for Thurtell, proving that (until Mr. Kelly's Bill passes) this functionary may always have it in his power to do a kind turn for a friend.

Sir Anthony, as our legal friends well know, was a great improver of the criminal law, and finding himself on the outside of a stage-coach next a gentleman who appeared to possess considerable practical knowledge of one branch of the subject, he was beginning to think of improving the acquaintance, when his companion suddenly stood confessed:

"Talking of hanging, Sir, the grand thing is to give your man neither too much nor too little rope; a good hangman fits him to an hair. Mr. Thurtell, who knew a thing or two, said I had not given him enough. 'Sir,' said I, 'let me alone, *I knows every gentleman's length*,' and I'll be upon my oath he gave but three kicks after he was turned off."[1]

Mr. Henry Bulwer, in his clever book on France, tells a story of a notary's clerk, who killed himself, because, having duly calculated and considered, he was convinced that it was not in his power to become so great a man as Napoleon. The motives of one of M. Berryer's clients, who made away with himself, are not quite so aspiring, but there is something equally national in his dramatic mode of expressing them. This individual, by name Gouvy, had established an iron forgery at Saint Louis; the town being beyond the ancient limits of the kingdom, Gouvy in 1814, came to consult M. Berryer as to the probability of its being reclaimed for Prussia. "My friend," were his last words on taking leave, "rest assured, that if fate makes me a Prussian, I am a dead man." The territory was eventually ceded to Prussia. Gouvy receives sure intelligence to this effect; he shuts himself up in his study; he writes, with the greatest clearness, a will in favour of his two nephews and his wife; he addresses to his beloved partner a touching letter of adieu, signed *Gouvy, mort Français*. All being thus arranged, he takes a pistol, and accomplishes the fatal vow he had made some weeks before.

The privileges of the bar were rudely assailed in the person of M. Berryer, under the following circumstances. Two merchants made him their joint depositary of some articles of agreement, which they wished to be kept private. One of them

[1] Captain Basil Hall says that, in the case of Thistlewood and the four men who suffered on the same occasion, "death was the instantaneous effect of the violent wrench to which the vertebræ of the neck were exposed in a sudden perpendicular fall of at least three feet;" but he expresses great indignation at the manner in which the ropes were attached to the beam. "My naval companion well nigh lost patience, and I verily believe, if I had not restrained him, would have run down to explain to the sheriff's bungling deputy how a line ought to be secured." —*Patchwork*, vol. ii. p. 77; from a chapter entitled *The Gallows and the Guillotine*, which throws more light on the effects of capital punishment than all the laboured essays we ever read upon the subject.

breaks faith and accuses the other of a fraud, calling on M. Berryer at the same time to produce the private articles, which he refuses to do without the consent of the other party. Thereupon a process was commenced against him for alleged connivance in a breach of faith, and the tribunal of Montargis condemned him to pay 25,000 fr. by way of damages. M. Berryer's first care was to lay the whole matter before the bar of Paris, who decided that he had acted properly throughout. Armed with this sanction he presented himself before the appeal court. The moment his name was called, the President of the court addressed him: "As to you, Sir, the cause is already decided; you have done your duty; take your place at the bar." The decision of this court was also clearly in favour of the merchant who was accused.

A striking specimen of the spirit of litigation was presented in the person of M. Selves, an ex-procureur from the provinces, who, from his fondness for law, is termed the Coryphæus of pleaders. This man, the French Peter Peebles, was never happy unless he was engaged in a suit, and he generally had them upon his hands by the dozen; making it a point of honour to fight every inch of ground, and, if defeated, to contest every item of the costs. Alluding to the manner in which he had retained his right of appeal by prefixing a cross to the disputed articles; he once exclaimed, "Gentlemen, we are told that it requires but a good sign of the cross to put the devil to flight: I have made more than a hundred, and I have not been able to put to flight an attorney."

On one occasion, when M. Berryer was opposed to him, he appeared with a pamphlet of his own composition in his hand, entitled, *Mort aux Procès!* in which he affected to be the milk of human kindness. M. Berryer proved from documents that he had been engaged in fifty regular suits in less than five years, interspersed with eighty interlocutory proceedings and a hundred and fifty references.

Another litigant of the same disposition was Pottin, Comte de Vauvineux; he spent his whole time in imagining grounds of action, and his whole fortune in enforcing them. His neighbours were the chief sufferers, and one of them was at

length driven to the expedient of buying him off at the rate of 1,200 fr. a year.

Amongst the cherished traditions of the Western circuit is preserved the memory of a race of yeomen, named Winter, who persecuted the Lethbridge family much in the same manner, and were too rich and too independent to be bought off.

The concluding chapter is devoted to the class of suits (commercial) in which M. Berryer has more particularly distinguished himself. As he truly says, volumes would not suffice for his exploits in this line, and we believe we have already given the details of those which possess attractions for the English reader. His account of two of the great banking houses of Paris, however, greatly raises our estimate of the traders of that capital.

"The house, Leconteulx & Co., was the most ancient; its descent, as a trading firm, could be clearly traced for many centuries. It had gradually established numerous branches or correspondents in several of the great towns of Europe; and it had a house at Cadiz whither all the members repaired to serve an apprenticeship of several years' duration, before they were admitted to take a leading part in the management of the concern. The principal branch establishment was at Rouen; and every year the two families of Paris and Rouen, wives, children, and grandchildren, met on a fixed day, in a large house, situated near Vernon half-way between Paris and Rouen, of which they were joint proprietors. Thither were brought all the account-books of the establishments; they proceeded to draw up an annual inventory, which was signed by the chiefs; after which they separated, and each returned to his destination."

"I have seen a cabinet in the archives of this firm, Place Vendôme, the cases of which were filled with ledgers for more than a hundred and fifty years, all regularly made up at the end of each year. At the close of one of these books, made up in 1720 after the failure of Law, I read an entry in the handwriting of the then head of the firm, to the effect that he had declined engaging or permitting his correspondents to engage in the scheme; that he had preferred settling with them, and remitting them their shares, which had thus been

saved. It ended substantially thus: 'This ought to warn our successors never to take part in speculations on government bills, or other paper money, connected with gigantic and adventurous undertakings.'

"The same archives bore testimony to the honourable pride of another of the chiefs in 1773. A recent edict had subjected all who had been ennobled within one hundred years to a tax. The collector wrote to M. Leconteulx de la Noraye to demand payment on account of letters of nobility granted to one of his ancestors. M. Leconteulx, not even aware of the honour, summoned the keeper of his archives, and demanded the letters in question. They were brought, and he instantly inclosed them to the minister with this note:

"'Monseigneur, it has pleased the august predecessor of his majesty to grant my predecessor the letters of nobility which you will find in this envelope. As I cannot believe that they have been granted for money, I cannot consent to give money to preserve them. Do not then take it ill if I renounce a title, which, were I to pay for it, would be neither a favour nor a distinction.'"

The London house which affords the closest parallel is that of Child & Co., of Temple Bar, in which, by a strange coincidence, the queen of fashion and exclusiveness, Lady Jersey, is the principal shareholder. This house has existed nearly two hundred years; it still holds out against the introduction of printed checks, and never licences a customer to overdraw. The firm is continued in an equally original manner,—by the admission of the senior clerk when a new partner is required; which excludes at once the influx of new capital and incapacity.

M. Berryer's connection with speculators brought him acquainted with a curious trait of the revengeful disposition of Napoleon, proving that he had very little of the spirit of one of his predecessors on the throne, who said it did not become a King of France to remember the quarrels of a Duke of Orleans. The quarrels of the soldier of fortune were seldom forgotten by the Emperor. Previously to his first departure for Italy to take the command, he applied to the brothers Cerfbeer, Jews, for a large private loan, which they refused. They subsequently entered into contracts for the supply of the army, but met with such obstructions, de-

lays of payment, and complaints regarding the quality of the goods on the part of the authorities, that they were eventually reduced to beggary.

The abbés figured on the exchange as well (or ill) as in the drawing-room. The Abbé d'Espagnac, though holding an abbey in *commendam*, was continually to be found amongst the money changers; and one speculation in particular gained him a not very creditable reputation on the Bourse. "When the shares of the East India Company were in the market, he bargained with the most responsible bankers in Paris for a number of shares greatly exceeding what really existed. When the day of transfer arrived, those of the sellers who had sold what they did not possess, found themselves at the mercy of the Abbé, who had a right to make them pay enormous premiums. The whole exchange was compromised; the government was compelled to interfere; it took upon itself the settlement of the bargains made with the Abbé, and exiled him to his preferment of St. Sever."

At the revolution, the Abbé engaged again in business; he became contractor-general, under the names of third persons, for the supply of military carriages. He was reported to possess a large fortune, which was enough to cause his imprisonment and condemnation. On coming out of the revolutionary tribunal, before mounting the scaffold, he delivered his last will to a person he could depend upon; in this, complaining of the faithlessness of the friends who detained his treasures, he cited the well-known passage from the *Ecole des Pères*: "*Acceptez, mais ne dérobez pas.*"[1]

Baroud, ex-notary of Lyons, was another speculator not devoid of originality. He had purchased a number of government annuities, on the Tontine principle, on the lives of thirty Genevese girls, "which," says M. Berryer, "offered attractive chances to speculators;" how, does not appear, unless the speculators were led to believe that the damsels in question were to be transferred to them. He was paid in bills, which became valueless in consequence of bankruptcies brought about by the revolution. These were bought up by a banking-firm, who, in the course of a suit against Baroud, termed him *agio-*

[1] Accept, but do not steal.

teur (stock-jobber.) The retort of Baroud, made on the instant, was singularly happy:

"I have wagered on the return of order, on the safety of persons and property, on the re-establishment of public prosperity, morality, and union; I have lost my wager, and I am *agioteur*. My opponents have wagered against all the mainsprings of civilisation — for war, for terror, for bankruptcy, for a fall, for the violation of laws divine and human; they have thus acquired their opulence, and *they* are honest men."

Two cases of literary property are mentioned, which attracted much attention. The one was a suit instituted by the French publisher of Pinkerton's Geography against Malte-Brun for plagiarism. M. Berryer defended him, and succeeded by showing that Malte-Brun had borrowed no more than the last of two writers on such subjects was justified in borrowing, and that the new edition of Pinkerton was enriched with the new division of the globe, entitled "The Oceanic," of Malte-Brun, who had made no complaint on that score.

The other arose from the publication, in 1821, of a book entitled, "*Memoires concernant Marie-Antoinette, Reine de France et de Navarre, par Weber, frère de lait de la Reine.*" In 1823, the Chevalier de Weber (the real Simon Pure) laid claim to the work, which, he said, was a republication of a work prepared and printed (though it would seem not published) by himself. Unluckily for the chevalier, neither his style nor turn of mind was of a kind to give plausibility to his claim, and the publishers settled the question by producing the original manuscript from the pen of a peer of France, "whose reputation, as a man of letters and a statesman, stood very high." The peer also produced documentary evidence which left no reason to doubt that he was the author of the work. M. Berryer suggests no excuse for the liberty taken with the Chevalier's name; nor does it appear to strike him as at all inconsistent with the dignity of the peerage to publish a catch-penny book upon another man's responsibility.

We mention the following case with the view of putting elderly ladies, of serious habits, on their guard:

A set of young men, bred up in the loose habits of the last years of Louis the Fifteenth, were one night supping at the palace of the Prince of Soubise, when it was proposed to treat

Brussels with a specimen of French profligacy; and the plan eventually chosen was, for one of them to marry the rich Belgian widow, Madame de Pestre,—devout, fifty, and supposed to be the best-jointured widow in Europe. They subscribed for the outfit, and then drew lots. The lot fell on the gallant best qualified for the enterprize, the Count de Wargemont, whose patrimonial property was situate in the same province with the widow's best estate. He was thus enabled to introduce himself as a neighbour; and after a short but sedulous attendance, although he had made no great progress towards the lady's favour, he had completely gained over her confessor and chambermaid to his cause. This being the state of things, he obtains admission to her bedchamber in the middle of the night. She calls for assistance, but the maid runs up, begs her to consider the scandal that would be occasioned by an exposure, and suggests the propriety of summoning the confessor. The opinion of this worthy was, that she had better hush up the matter by marrying the Count. In an evil hour she consented: for though the bulk of her fortune was secured to her, the entire remainder of her life was embittered by lawsuits instituted by the Count, who, five months after the wedding, wrote to her as follows:

"'I had no other object in marrying you than to spend money, and gain a fortune; you might have guessed what I proposed to myself, in marrying a woman of fifty, with seven children.

"'I will cause you to be enjoined to come to me: you will then do nothing but what I permit you to do; *en attendant*, I will cause all your property to be seised.'"

A flattering mark of sympathy was vouchsafed to M. Berryer, at the end of one of his pleadings in this cause. A lady of sixty was seated behind him, and showed strong symptoms of agitation. After consulting a few moments with her companion, she bent over and whispered in his ear: "Monsieur, je vous prie d'accepter cette bague de mes *jeunes* cheveux.[1]"

This part of the publication closes with a characteristic passage:

"Now that my whole juridical life is recapitulated, and my readers have data (at least approximations) as to the immensity of the labour it has brought with it, it remains for

[1] I beg your acceptance of this ring of my *young* hair.

me to explain how it has happened that I have been equal to so much meditation and so many struggles; how I have even acquired my brevet of longevity in the midst of them."

"The key to this enigma, vanity apart, is the line of Horace:

'Omne tulit punctum, qui miscuit utile dulci.'

It is my innate gaiety, nourished by the *esprit public Français* in the time of my youth, by the amenity and (I may say) by the hilarity of manners, down to my thirty-second year; a gaiety which has always lent me unhoped-for strength. A happy marriage, a cheerful home, have enabled me to keep this sacred fire alive under all regimes, without its being once extinguished—it was not under the eighteen months of terror, nor is it now under the frosts of age."

"In all the convivial meetings of colleagues, it was always to me that they applied to enliven the feast. The most comic songs, such as those of the *Postillon du Bourget, la Bouteille, Le Capucin*, the *Mariage à Fanchonette*, and others, were alternately demanded of me. Fond of laughing, like myself, they all united in conferring on me the diploma of *Vadée moderne*, without ever joining to it that of *mime*, which I have always disliked, and which would have degraded my character.

"I remember that at the vacation banquet to which I was invited by all the bar of Rouen, thirty years ago, the youngest of our neophytes having suppressed in a jovial song, which I knew by heart, the most glowing couplet (le couplet le plus *graveleux)*, I thundered it out, at the pitch of my voice, to the great—I may say, electrical—satisfaction of all the guests."

"But there is no longer any laughing in France. I retain these bounds of my gaiety by myriads, until opinion shall furnish me with passports for them. Then will come the chapter of my confessions, which would not be the most soporific of my recitals. I will wait."

It is fortunate for M. Berryer that he did not join the Northern Circuit, or he would most assuredly have received an epistle remonstrative from the author of "The Velvet Cushion."

There is an appendix, entitled, *Quelques Vues en Economie*

Politique, showing that the author is much a-head of the mass of his countrymen in this field of speculation; but it is hardly within our province, and there is only one incidental remark which we think it necessary to quote. In allusion to the licence of the press, he exclaims:

"I wish there were established, as in England, a tribunal of equity, before which all those malicious pamphleteers could be taken, and that heavy fines were imposed for every offence, more or less injurious, against truth and propriety. The injuries to individuals, a great number of which evade the definitions of the law, would be avenged by this tribunal of equity."

It thus appears that the most experienced advocate at the French bar really believes, that an English court of equity exercises the functions of a criminal court, exempt from rule; *i. e.* that it is a species of court under which no free or civilized nation could well exist. Yet we complain of the comparative ignorance of English lawyers regarding the laws of any country but their own!

We part from M. Berryer with extreme regret and the most sincere esteem. Our only consolation is, that health, strength and spirits will be spared to him, to complete the comic portion of his reminiscences. We still laugh in England, whatever they may do in France; and (unless a glorious Three Days should occur in the interval) he will be sure of finding cordial and congenial readers amongst *us*.

H.

ART. X.—LICENSE OF COUNSEL.

License of Counsel and Criminal Procedure. (Reprinted from The Westminster Review.) 1841.

THIS pamphlet or article is the production of a man of talent, information, and good sense. It deserves to be generally read, and has already attracted much attention; we are therefore anxious to qualify some few of the accusations indiscriminately levelled at the bar. The writer might have spared us the trouble, and his arguments would have circulated without a check, had he simply been upon his guard against one prejudice and one fallacious mode of reasoning, invariably adopted by the leading writers of his school.

The prejudice, is that which leads them to suppose that an English lawyer can never act or think with propriety—that he is *ex vi termini* a narrow-minded and wrong-headed animal, incapable of comprehending anything lying an inch beyond the range of his pursuits, and habitually sacrificing sense, feeling, honour, and honesty to his technicalities. No matter what his original breeding or education: no matter whether he joined the profession before or after his modes of thinking had been formed: no matter to what extent he has improved his mind by reading, observation, or travel: no matter what proofs he has given of his capacity for other sorts of intellectual exertion,—let him once enter a pleader's office, join a circuit, or take any other step towards becoming a practitioner, and no argument he can henceforth urge is to be attended to, no statement regarding his new calling to be believed. For example, even we ourselves, were we to meet this gentleman in society, should probably be heard with attention on any general subject which we had been studying for years; yet he coolly though courteously assures us that we cannot be conversant with the practice of our criminal Courts, or we should be aware that "an eminent English practitioner would for a guinea fee pledge his honour as a gentleman that he believed his client to be innocent," in a case (as we understand the proposition) in which he was certain of the contrary. This notion is about as accurate as M. Berryer's of an English Equity

Court (ante, 142), yet, we will answer for it, no assurance on the part of the only persons who can set him right will satisfy him. He will answer them, as Roman Catholic gentlemen are sometimes answered when they assert that they consider an oath binding: "it is all very well for you to say so, but I happen to have peculiar information on the point."

The mode of reasoning to which we allude, is the habit of laying down abstract propositions, and arguing from them as if they were mathematical axioms—the worst possible mode of reasoning for political or moral questions, questions "immersed in matter," as Bacon terms them. Frame your rule or proposition as precisely as you may, such are the imperfections of language, and such the difficulty of anticipating contingencies, that, within a short time after it comes to be applied to conduct or affairs, there is a hitch; and you yourself are under the necessity of admitting that it will never work smoothly, unless some exception, modification or qualification be annexed.

The doctrines of these gentlemen regarding codes, form the best illustration of the influence of this peculiar habit upon their intellects; but ample traces of it are discoverable in almost all their writings, and the article before us is lamentably impaired by it. The writer has heard it said that a counsel is bound to do his best for his client without regard to consequences or his own private opinion upon the case. He finds a rhetorical, and of course exaggerated, statement of this rule in one of Lord Brougham's speeches on the Queen's trial, and he forthwith goes on to argue in effect, that, as no man can be considered to do his best who does not do every thing calculated to serve his client, the rule of the English bar is to stick at nothing, and that Mr. Phillips's defence of Courvoisier was within the spirit (because within the letter) of that rule. By this mode of reasoning it would be equally easy to prove, that a counsel would be justified in picking the opposite attorney's pocket of a document calculated to prejudice the accused; and he must be a very poor casuist who requires to be told that particular engagements or obligations of this kind are always subject to the general obligations of morality. A counsel is not to lie, steal, or bear false witness, because he has engaged

to do his best for his client, but he is to find the best arguments he can for him, and see that the prescribed forms are attended to throughout. The English bar act upon this principle, but no strict unvarying rule has been prescribed, and their general practice is in strict accordance with the opinions held by the thinking portion of society. What thinking man can doubt that, if counsel were bound to appear for no one whom they did not consider in the right, and use no arguments they did not deem unanswerable, the administration of justice would be seriously impaired—more causes be decided against the merits, more innocent persons be convicted, and more guilty persons escape? The effect, as regards the litigant or alleged criminal, would be, that, if he chanced to be a man of doubtful character, or appearances were against him, he would get no counsel, and run little chance of having the full bearings of his case fairly laid before the jury, if he did; as regards the bar—that the better class would shrink from the responsibility, would decline pledging their personal honour in a succession of doubtful struggles, at the risk of having it said in every case of failure that they had been induced to do a dirty action for a fee; and the whole business would soon devolve on men who had no scruples of delicacy, nor much in the shape of reputation to be anxious for.

At present, as we formerly observed, the merits are altogether beside the argument; the barrister (to borrow Mr. Stammer's words) "may be called a mere finder of arguments on one side of a given question:" he leaves the task of deciding to the jury or the judge, and is guilty of no falsehood or deceit whatever in the invidious acceptation of the terms. We shall next be told that an actor ought to be indicted for obtaining money under false pretences whenever he takes money for pretending to be a king; or the only mode of avoiding the imputation of hypocrisy in writing to persons we dislike, will be to imitate the Ettrick Shepherd, who began a letter to Sir Walter Scott *D——d Sir*, and ended it *Yours contemptuously, James Hogg.* If, indeed, a barrister were to vary the ordinary mode of address in such a manner as knowingly to lead the judge or jury to give credence to an untruth in reliance on his veracity, he would be liable to precisely the same

amount of censure as if he had publicly forfeited his word on any other occasion of equal moment.

We have already intimated our opinion of the line taken by Mr. Phillips in his defence of Courvoisier, and we see no reason to retract or vary a syllable; except indeed to add that he was placed in a very difficult and trying situation, for which great allowance is to be made. It is admitted on all hands, that he would not have been justified in throwing up his brief in the middle of the trial,—the stage in which the difficulty first arose; but the rules of the bar required nothing more of him than that he should watch the proceedings and point out the precise bearings of the evidence. We ourselves think that he would have acted wisely in not dealing out accusations against third parties. However, we have heard it contended by men of sense, unconnected with the profession, that, if a fair comment on the evidence implied such accusations, he was quite right in making them; and it is unjust to discuss the question as if the invidious view of it was limited to the bar. It is one, we repeat, which, discussed on the broadest principles of expediency and with exclusive reference to "the greatest happiness of the greatest number," would divide and puzzle the best casuists of the day.

As a matter of taste, too, we object to the peroration and sundry other emphatic passages in the speech; but only as a matter of taste; and this reminds us of a curious inference drawn by the reviewer from a former remark of ours to that effect:

> "It appears, then, that the rule of the barrister, to consider no one but his client, is not so absolute, but that it may be overcome by the 'good taste' of the gentleman."

The best definition Boswell could obtain of taste after asking all the literary men of the day, was one given him by Lord Stowell: "That faculty of the mind which leads a Scotchman to prefer England to his own country." We do not pretend to improve on this, but we always thought good taste implied a degree of judgment or a certain sense of the fitness of things; and when we say that a speech is not in good taste, we mean that, so far as it errs on that score, it is not adapted to the purpose or the occasion.

We are tempted to quote another portion of this commentary. In allusion to Mr. Phillips's appeal, we said, that "he had only to go a step farther and introduce the melodramatic absurdities of the French criminal courts, where it is not unusual for an advocate to stand up and embrace a client of the Vautrin or Robert Macaire class, by way of conveying an impression of his innocence."

The reviewer replies: "The accomplished editor is surely not conversant with the practice of our criminal courts, or he would be aware that we do *such things*, only in a mode better calculated to attain the same end with an English jury." Then comes the statement that an eminent English practitioner would, for a guinea-fee, pledge his honour as a gentleman, &c.

We do not do such things, and we have yet to learn that pledging one's honour as a gentleman is a melodramatic absurdity. If we were to accuse the French bar of standing on their heads, this writer would probably tell us that the English bar are in the habit of picking pockets. He forgets that we were simply talking about taste; and we doubt whether this French practice could fairly be referred to any other category; for, if familiarly known and understood, it is no more calculated to deceive than Mr. Phillips's peroration, and may rank with slapping the breast, extending the arms, raising the eyes to heaven, or any other of the conventional tricks of oratory.

We turn with pleasure from passages of this sort to observations in which we can partially concur. The larger and better half of the article is occupied with a forcible exposure of the evil occasioned by the rude treatment of witnesses, with suggestions for its cure; and notwithstanding the marked improvement that has taken place of late years in the metropolitan criminal courts in this respect, it is undeniable that the bullying system, which has made the Old Bailey a bye-word, is still much too frequently pursued. The consequence is, that no one will prosecute or give evidence who can avoid doing so, and hundreds of criminals are annually let off.[1] The practitioners in other courts are also apt to disregard the feelings of third parties—to treat every adverse witness as a witness of untruth—to cross-examine too often,

[1] The police reporters have also much to answer for in this respect.

too harshly, and too long. The reviewer's remonstrance, therefore, will be deemed neither misplaced or ill-timed by the public, whatever the old stagers of the profession may think of it.

He begins by proving, that harshness is impolitic as well as improper:—

"But the 'shattering' and 'flagellation' of witnesses is not conducive to the end of investigation,—viz. the truth."

"'Clothed in authority derived from the authority, and in symbolic robes analogous to the judge, the advocate,' says Mr. Bentham, 'observing in an honest witness a deponent whose testimony promises to be adverse, assumes terrific tones and deportment, and pretending to find dishonesty on the part of the witness, strives to give his testimony the appearance of it. I say a bonâ fide witness; or in the case of a witness who by an adverse interrogator is really looked upon as dishonest, this is not the proper course, nor is it taken with him. For bringing to light the falsehood of a witness really believed to be mendacious, the more suitable, or rather the only suitable course, is to forbear to express the impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some irretrievable contradiction at variance with other parts of his own story, or with facts notorious in themselves or established by proofs from other sources.'

"We happen to be aware, from the practice of persons of the highest experience in the examination of witnesses, that this description is almost without exception correct, and that, as a general rule, it is only the honest and timid witness who is confounded by imperious deportment. The practice gives pre-eminence to the unscrupulous witnesses who can withstand such assaults. Sir Roger North, in his 'Life of Sir Dudley North,' relates, that the law of Turkey, like our absurd law of evidence in some cases, required the testimony of two witnesses in proof of each fact, and that a practice had, in consequence, arisen and had obtained the sanction of general opinion, of using a false witness in proof of those facts which admitted only of one witness. Sir Dudley North, while in Turkey, had numerous disputes which it became necessary to settle by litigation, 'and,' says his biographer—

"'Our merchant found by experience, that in a direct fact a false witness was a surer card than a true one; for if the judge has a mind to baffle a testimony, an honest, harmless witness that doth not know his play cannot so well stand his many captious questions

as a false witness used to the trade will do; for he hath been exercised, and is prepared for such handling, and can clear himself, when the other will be confounded; therefore, circumstances may be such as to make the false one more eligible.' "

Where, it is added, there is no opportunity for casting direct imputations upon a witness, a different mode of handling is pursued:—

" We might adduce such practices as that of the advocate turning his eyes away from the witness box whilst he asks the witness a question. The simple witness, doubting whether the question was addressed to him, or believing that it was addressed to some one else, hesitates, or does not answer. When the witness has evidently lost his self-possession, he is asked, in a thundering tone, why he is so reluctant to answer: or if that does not promise success, he is plied with another question which leads him away from explanation, and thus an impression is probably made on the minds of the inexperienced jurymen, that the witness had been fearful of the effect of his answer, and had, for sinister purposes, withheld it. The following is an instance of the practice of Garrow, who was held up as a 'masterly cross-examiner.' The case was that of a witness who was deaf, and whose deafness it was this advocate's part to make appear pretended. He said to the witness in a low tone, 'So you have the misfortune to be deaf?'—'Yes, sir.' 'You have great difficulty in hearing?'—'Yes, sir, very.' 'And it was not till I raised my voice thus (lowering it still more) that you could hear what I said at all?'—'No sir.' The jury and the whole of the auditory roared with laughter, and the witness might as well have been utterly deaf and dumb too, for the service of his testimony in the cause of justice. And yet any person of experience with individuals hard of hearing, knows well (and no one knew better than the counsel) that distinctness of enunciation will often, better than loudness, enable a witness to hear or comprehend what is addressed to him. In this instance the enunciation of the advocate was painfully distinct; and it might be that the deaf witness *saw* what the cross-examiner said, rather than heard it: the counsel's voice *looked* loud, and the witness believed it to be so."

But suppose the witness was not deaf,—and, according to the received version of this story, he was not?

Our readers have had enough of Courvoisier's case, and we shall therefore pass over the writer's comment on the strong epithets applied by Mr. Phillips to the witnesses, with one remark,—they did not meet with the approval of the bar; and

we do not think the bar, as a body, would object to the check suggested in the following passage:

"Though the depraved state of the bar permits the practice of such inflictions in public trials, it does not prevent the judge from doing justice, by endeavouring to soothe the irritation, and at the same time manifesting the feelings of a gentleman. We shall endeavour to aid the conception of the practicability of such a course of reparation by supposing the following scene."

JUDGE.

"'And now having passed the sentence of the law on the criminal, and expressed the opinion of the Court on the aggravation of the character of the crime by the foul character of the defence, a duty remains towards those persons who have come forward to further the ends of public justice. Madame Piolans, you have come forward with praiseworthy alacrity to state the fact which was extremely important to ends of public justice. The Court has to regret that in doing so you have been accused of perjury, and that your respectability has been questioned. You will consider that your credit, instead of being impaired by this false accusation, is confirmed and increased by your conduct in this case. I would that this expression of the favourable opinion of the Court might compensate as well as relieve any pain to which you may have unfortunately been subjected in the performance of what, under any circumstances, must be a painful and embarrassing duty to a private person and a female.'"

"'Sarah Mansell, you will understand that the verdict of the jury is a verdict of their belief of your trustworthiness and truth; let not the painful recollections of the horror of the scenes you have witnessed be aggravated by doubts that there exists a suspicion in any mind that you have acted otherwise than with a good intent, and to the best of your capacity, as became a faithful subject.'"

"(To the Police). 'The Court regrets that, in the zealous performance of your duty, you have individually been subjected to deeply criminal accusations. The Court must accompany the verdict which establishes your innocence of the charges preferred against you, with an expression of their opinion that in this case you performed your duty actively and honestly. It would be unjust to criticise with the advantage of afterthought; but it must be said that, in a case which, happily, must be almost as extraordinary to you, or to a still more experienced force, as to any other persons, and in the absence of instructions devised from past experience to meet such cases, we think the mode in which the duty was performed in respect to skill to be a subject of great indul-

gence. Let those who have heard the contumelious expressions detracting from the *general* character of the force know, that the *general* conduct of the new force has been the constant theme of approbation by grand juries in this Court and others, and in the present instance their conduct has been highly satisfactory to the Court.' "

Assuming this to mean merely that the Court is to interfere rather more frequently for the protection of witnesses, we cordially agree with the writer; but when he attempts to go further, he falls into the old error of supposing that every thing can be provided against by rules, and manifests a singular unacquaintance with the manner in which actually-occurring cases are got up and conducted:

" The practical rules of law which we should propose for the abatement of the evil, in addition to the real examination of the accused, would be to the following effect:

" That no man, whether the accused or his agent, shall be allowed to use false accusations, or do that in court for his defence which he would be punishable for doing out of court, for any other purpose than for his defence.

" That the counsel shall not assume a witness to be untrustworthy, or be allowed to treat him as such, unless upon some fact set forth in his brief, which shall be producible in court.

That the attorney shall be responsible for the exercise of reasonable care in the preparation of instructions, that no groundless or wilfully false imputations be used in the defence."

Now for the application:

" The accusations made by the counsel against Madame Piolans were, that she was the keeper of a disreputable house—a common gambling house—and was unworthy of credit. We will suppose, under an altered rule of law, such a course as the following,

" The counsel, on using the term 'this woman,' invidiously, and coupled with expressions which convey the imputation, is interrupted by the judge:—' Mr. Phillips, you of course are aware as yet that no evidence has been elicited to show that the house kept by Madame Piolans is disreputable; we presume that your instructions set forth facts which you are prepared to adduce that will justify the course you have taken with respect to her.'

" *Counsel.*—Certainly, my Lord.

" But the trial concludes, and no facts justificatory of the allegation have been adduced.

"*Judge to Counsel.*—In the course of the defence, imputations of a painful nature were cast upon one of the witnesses, Madame Piolans, who came forward in aid of public justice. It is our duty to call for your instructions.

"*Counsel.*—They are these, my Lord. 'The witness, Madame Piolans, is the keeper of a disreputable house—a common gambling house—the resort of persons of no character.'

"*Judge.*—Mr. Attorney, this imputation appears to be entirely unsustained. How is it that it was inserted in the brief?

"*Attorney.*—Upon the prisoner's instructions, my Lord.

"*Judge.*—What facts did he communicate to you to justify the accusation?

"*Attorney.*—The fact that a billiard table was kept in the house?

"*Judge.*—But the possession of a billiard-table, any more than the possession of a pack of cards, does not make the place a gambling-house. Did you send to the neighbourhood to ascertain, from respectable persons, what is the character of the house, or learn whether there had been any proceedings before a magistrate, or convictions had against it?

"*Attorney.*—No, I did not, my Lord.

"*Judge.*—Then you failed in your duty. Had you made reasonable diligent inquiry, you must have learned what now appears, that there was no foundation for the imputation. Your culpable neglect must have been the occasion of pain to a respectable witness, and has created an example calculated to operate most injuriously to the interest of public justice. The law entitles a prisoner to have his offence legally proved, and to have a free defence; but the liberty of defence does not include the license to resort to false imputations. To the offence of which he has been convicted, he has added another, though a minor offence, to which you have, by your culpable remissness, been accessary, and have given effect. To him no additional punishment is assigned, because it is impracticable; but on you the court must pronounce a sentence of suspension from your practice; and the party injured—the witness and her husband, whose house you have been the means of defaming—will have an opportunity of seeking compensation for the injury.

"The practicability and efficacy of such a course will surely not be disputed."

We dispute both. Unless the judge were prepared to try a set of collateral issues in each case, it would be utterly impossible for him to punish either party. It is very easy to frame a dialogue in which an Old Bailey attorney shall answer like a simpleton; but how many of them, with such pe-

nalties impending, would give such answers in reality? Besides, can it be gravely maintained that a counsel is never to hazard a suggestion reflecting on a witness, unless he is prepared on the instant to establish it by strict legal evidence? We have already said that we do not justify the language in question, but its injurious consequences are grossly exaggerated, and care must be taken not to cramp the means or blunt the instruments which are strictly necessary for the elucidation of the truth. The Rev. Sydney Smith, in whom the finest humour is ever subservient to good sense, has put this in the proper light; and we make no apology for repeating him:

"Does this open every view which can bear upon the question? Does it in the most effectual manner watch the judge, detect perjury, and sift evidence?—Of what importance is a little disgust at professional tricks, if the solid advantage gained is a nearer approximation to truth. What an eulogium of a trial to say, 'I am by no means satisfied that the jury were right in finding the prisoner guilty; but every thing was carried on with the utmost decorum. The verdict was wrong; but there was the most perfect propriety and order in the proceedings. The man will be unfairly hanged; but all was genteel!' If solemnity is what is principally wanted in a court of justice, we had better study the manners of the old Spanish Inquisition; but if battles with the judge, and battles among the counsel are the best method, *as they certainly are*, of getting at the truth, better tolerate this philosophical Billingsgate, than persevere in solemn and polished injustice.[1]"

Injurious imputations by counsel, not justified by facts, make little or no impression on the audience, and are no more a fit subject for penal legislation than other breaches of good manners and veracity. They are yearly growing rarer, and, under the joint ban of the public and the profession, the practice of making them cannot well fail to be altogether discontinued before long.

This essay contains some valuable remarks on other topics connected with criminal procedure. The writer reprobates English justice for constantly vacillating between two sets of blind presumptions; the ancient one, which presumed guilt in all who were accused, and the modern one, which presumes that

[1] The Works of the Rev. Sydney Smith, vol. ii. p. 273.

all who are accused are innocent, and even after conviction bestows unbounded sympathy on the criminal. He calls for the middle course of *not proven* in cases where the evidence is of a doubtful character,—casting strong suspicion without being strong enough to enable the jury to convict; and he contends vehemently for the examination of the prisoner:

"The very rule for which the English practitioners endeavour to maintain a superstitious awe, the rule forbidding the interrogation of the accused in any stage of the procedure, either at what was originally intended to be *his* examination, or at the trial,—that rule which shuts the mouth of the guilty for fear he may commit himself, also shuts the mouth of the innocent man who may be accused, and prevents him giving the circumstantial explanations which he alone could give in answer to any questions put to him. An innocent person could really be in no more dangerous hands than in those of a practitioner of the class belonging to the criminal courts, who inveterately act on the latent presumption that their client is guilty, and cannot open his mouth without endangering himself."

Few innocent persons, according to this writer's own showing, are likely to place themselves in the hands of practitioners of this class; and we have seldom found accused parties slow to afford satisfactory explanations when they can. But even innocent persons, from an over-eagerness to *clear* themselves from suspicion, are apt to fall into contradictions, which may subsequently be turned against them; and, judging from the practice of other countries, we should say that these prior examinations are very far indeed from being favourable to the accused. Take a specimen from the famous trial of Madame Lafarge:

"D. Qui a fait ces gâteaux?

"R. C'était ma belle-mère, (se reprenant) madame Lafarge mère.

"D. Madame Lafarge mère les a-t-elle faits d'elle-même?

"R. Je crois que je les lui ai demandés la veille.

"D. N'avez-vous pas demandé qu'elle écrivît une lettre pour attester que c'était elle qui avait fait les gâteaux?

"R. Je ne me le rappelle pas.

"D. Si vous m'aviez répondu affirmativement, je vous aurais demandé pourquoi vous les aviez fait faire par la main qui devait paraître la plus innocente, et si vous n'aviez pas là un motif facile à comprendre?

"R, J'ai répondu ce que je sais être la vérité. J'ai dit les choses

comme elles se sont passées. Madame Lafarge mère savait faire la pâtisserie; continuellement elle m'en faisait.

" D. Est-ce que M. Lafarge mangeait de préférence des gâteaux faits par sa mère?

" R. Non, Monsieur.

" D. Alors, il est étonnant que vous avez insisté pour que se fût précisément elle qui les fît. L'envoi de gâteaux fait par vous était la seule chose qui pût le toucher. Peu importait de quelle main ils eussent été fabriqués."

The examining magistrate gets heated in his own despite, and feels it a point of honour to involve the prisoner in a contradiction. If the examination were private, the answers might be warped in such a manner to illustrate the ingenuity of the questioner. We speak advisedly, when we say that such things are constantly happening both in Germany and in France.[1] In Scotland the prisoner may be questioned, but he is at full liberty to decline answering, and he is never pressed or persecuted. This writer expresses a readiness to repudiate the French practice, whilst he vindicates "the principle, that a judicial investigation should be conducted with the same full and careful examination of the accused, as would be given in private life by sensible and judicious persons." Whatever's best administered, is best; but how many of our committing magistrates would he admit to be sensible and judicious persons?

H.

ART. XI.—THE LATE SIR WILLIAM BOLLAND.

A NATURAL feeling of surprise has been expressed by the friends of the late Sir William Bolland, that we have hitherto neglected to pay the ordinary tribute to his memory. The delay has been purely accidental, for he is precisely one of those lawyers who do most honour to the profession,—on a principle we formerly laid down. He won his forensic honours fairly; he did his judicial duties well; and he, notwithstanding, contrived to maintain a distinguished position in the best intellectual society of his day.

[1] See the Law Mag. vol. viii. p. 318, &c.

Sir William Bolland was the eldest son of William Bolland, of London, merchant, who was in the habit of serving a good deal on special juries at Guildhall at a period when these were almost exclusively composed of the very first class of commercial men. He lived to see his son elevated to the Bench, and the interest he himself had formerly taken in legal matters, must have added not a little to his gratification on this event.

Sir William was born in 1772. He was educated at Reading, under the late Dr. Valpy, at the same school which boasts the honour of having sent forth Mr. Serjeant Talfourd, another and one of the most distinguished of that class of lawyers of which the profession has most reason to be proud. He (Bolland) was a great favourite with his master—as indeed he ever was with every one with whom he was in any way brought into connection through life—on account of the sweetness of his temper, and the kindness of his disposition; nor can it be doubted that the interest Dr. Valpy took in the formation of his taste, was the principal cause of the passion for books and literature which afterwards formed so prominent a feature in his character. He left Reading school for Trinity College, Cambridge, at the usual age for entering the University. He here formed a friendship with Lord Lyndhurst (then Mr. Copley) which remained unbroken till his death. They took their degrees about the same time (1794), and appear to have been, in the strictest sense of the word, cotemporaries; but their ambition was of a different order. Copley stood for and acquired high mathematical honours and a fellowship. Bolland contented himself with winning three of the Seatonian prizes; the subjects being "The Epiphany," "Miracles," and "St. Paul at Athens." The tutor (Jones) was once heard to say, "Bolland appears to look down upon our pursuits (meaning mathematics), but he has a ready apprehension, and enters fully into our reasonings."

The Inn of Court of which he became a member with a view to the bar, was the Middle Temple. His instructor in in the noble science (as Coke truly terms it) of special pleading, was the late Mr. Justice Holroyd; and it is to be presumed that he devoted more than cursory attention to it, as he subsequently practised for some years below the bar. He

was not called till Easter Term, 1801.[1] He joined the Home Circuit, and attended the Kent sessions, as well as those for London and Middlesex, and the Metropolitan Criminal Courts. In all of these, no doubt aided by his father's connections, he soon obtained extensive practice, and on Mr. Knowlys' appointment to the office of Recorder, he succeeded that gentleman as one of the City Common Pleaders. He retained this situation until he was raised to the Bench, when he was succeeded by Mr. Russell Gurney. In 1815 he was sent on a commission with Mr. Justice (then Mr.) Holroyd and (we believe) Mr. Dyer, to inquire into the laws of Jersey. They spent some weeks in the island, and made an elaborate report, which, little to the credit of the successive occupants of the Secretary of State's Office, has been permitted to sleep there ever since. In 1816 he was sent down, with Mr. Justice Richardson and Mr. Baron Gurney (both then at the bar), to conduct the prosecutions on the part of government, at the special commission in the Isle of Ely. The accused parties were the ringleaders in an insurrection of a treasonable character, which, after lasting three days and occasioning an infinity of mischief, was put down by the military.

Sir William Bolland was a good, though not a deeply-read, lawyer, and a sensible, well-informed, judicious and gentlemanly advocate.

He was made a Baron of the Exchequer in Michaelmas Term 1829, his friend Lord Lyndhurst being then Lord Chancellor. Some doubts were certainly entertained at the time as to the propriety of this appointment, and we ourselves were amongst the cavillers; but we were wrong. Lord Lyndhurst knew his man: it was not a mere private preference, but a deliberate conviction of the fitness of the candidate, that influenced his decision; and it is allowed on all hands that the late Baron's sound sense, knowledge of the world, and liberal, upright, manly tone of mind, more than compensated for any comparative deficiency in legal attainments. He turned out a respectable judge in civil business, and a very good one in criminal cases. The slowness which might occasionally have

[1] We invariably refer for dates to that very useful book, *Whishaw's Synopsis of the Bar.*

been charged against him, was solely owing to his conscientiousness.

His fondness for rare and curious books began very early in life, grew with his growth and strengthened with his strength. At one time he was quite enthusiastic in the pursuit; and the sum produced by the sale of his library (exceeding £3000), bears ample testimony to his munificence and judgment in this particular. It is not the least remarkable circumstance of his career that his descendants are entitled to inscribe upon his tombstone: "Here lies the founder of the Roxburgh Club." It took its rise at a dinner party at his house. He had also amassed a valuable collection of coins. He was fond of shooting, and might have rivalled Sir Humphry Davy or Sir Francis Chantrey in enthusiasm for fly-fishing, though hardly a match for them in skill.

He married (in 1810) his first cousin Elizabeth, daughter of Mr. John Bolland, merchant, a lady of great personal attractions, by whom he has left three sons and two daughters. An affecting testimony to the late Baron's amiability in all the relations of private life, appeared in the Morning Herald for May 22, 1840, in the shape of a letter, signed Amicus, generally understood to be a college contemporary who once filled a judicial situation in the colonies. Sir William Bolland retired from the Bench on account of ill health in January, 1839, and died in May, 1840.

H.

DIGEST OF CASES.

COMMON LAW.

[Comprising 10 Adolphus & Ellis, Part 2; 11 Adolphus & Ellis, Part 1; 3 Perry & Davison, Parts 3 and 4; 1 Manning & Granger, Part 2; 8 Scott, Part 2; 1 Scott's New Reports, Parts 2 and 3; 6 Meeson & Welsby, Part 4; 8 Dowling's Practice Cases, Parts 4 and 5.]

ACCORD AND SATISFACTION. See PLEADING, 16.

ACTION ON THE CASE.

(*For obstruction in highway.*) In an action to recover compensation in damages for an injury occasioned by an obstruction in a highway, it was left to the jury to say, whether or not the plaintiff was himself in any degree the cause of the injury, whether he had acted with such want of reasonable and ordinary care as to disentitle him to recover: Held, that the direction was proper. (11 East, 60; 3 M. & W. 244.)—*Marriott* v. *Stanley*, 1 Scott, N. R. 392.

AFFIDAVIT.

If affidavits used on a rule, with respect to a matter of arbitration where there is no cause in Court, improperly introduce the words "plantiff" and "defendant," after the names of the parties, in the title of the affidavits, those words may be treated as surplusage.

A commissioner need not put his initials opposite an immaterial alteration in an affidavit sworn before him.—*In re Imeson and Horner*, 8 D. P. C. 651.

AGREEMENT.

The defendants and R. T. were partners in a colliery, and in October 1835, the defendants signed an agreement with the plaintiff, purporting to be made between the defendants and R. T. of the one part, and the plaintiff of the other part, by which the parties of the first part agreed to sell and deliver to the plaintiff a certain supply of coals from their colliery for the term of three years, to commence from the 1st July 1837, at a certain price: the instrument also contained a stipulation by the parties of the first part, for a lease to the plaintiff of a wharf. At the date of this agreement the parties were acting under a similar agreement, which was to expire on the 1st July 1837, and was executed by R. T. also, but R. T. never signed the agreement in question, and on being asked so to do, in July 1837, refused. There was also evidence that the plaintiff had treated this

agreement as not binding: Held, in an action by the plaintiff against the defendants on the agreement, that it was a question for the jury, whether the parties intended the instrument to be binding only on the condition that R. T. should sign it.—*Latch* v. *Wedlake*, 3 P. & D. 499.

AMENDMENT.

1. (*Of writ of summons.*) Where a writ of summons was by mistake dated the 4th of April, the præcipe being dated the 4th of May: Held, that a judge had power to order an amendment of the writ, so as to make it correspond with the præcipe. *Kirk* v. *Dolby*, 6 M. & W. 636; 8 D. P. C. 767.

2. (*Of writ.*) The plaintiffs having brought an action of debt against the defendant, obtained a distringas and proceeded to outlawry. The defendant did not render to the sheriff on the exigent, but before the last proclamation entered an appearance, but without obtaining a supersedeas. The plaintiffs thereupon stayed all proceedings in the outlawry: but having another cause of action against the defendant on a special contract, commenced an action of assumpsit against him, and applied to his attorney to appear for him, which the latter refused to do. The plaintiffs then proposed to consolidate the two actions, by changing the first writ in debt into assumpsit, so as to include both causes of action in the latter. This the defendant refused to do, and kept out of the way to avoid being served with the writ. The Court refused to set aside the appearance to the first writ, or to allow that writ to be amended.—*Green* v. *Kettleby*, 6 M. & W. 731; 8 D. P. C. 783.

3. (*At nisi prius.*) Declaration on a promissory note for 250*l.* made by the defendant, dated 9th November 1838, payable to plaintiff on demand. The note produced at the trial was a joint and several note for 250*l.*, made by the defendant and his wife, dated 6th November 1837, payable to the plaintiff twelve months after date, with interest. It did not appear that there was any other note between the parties: Held, that this was a variance which the judge at the trial might amend.—*Beckett* v. *Dutton*, 8 D. P. C. 865.

And see BILL OF EXCEPTIONS.

ARBITRATION.

1. (*Statement of grounds for setting aside award.*) It is insufficient to state the grounds of objection to an award, in a rule for setting it aside, in general terms, as that the award is not final, that the arbitrator has exceeded his authority, that the award is uncertain, or that the arbitrator has not awarded on all the matters submitted to him. (4 N. & M. 788.)—*Gray* v. *Leaf*, 8 D. P. C. 654.

2. (*Award, when sufficiently certain.*) To a declaration containing a claim of 200*l.* for horse-keep, and 200*l.* for goods sold, the defendant pleaded, except as to 150*l.*, non assumpsit, and as to that sum, payment. The cause was referred, and the arbitrator awarded that, on the first issue, the verdict should be entered for the plaintiff; as to the second issue, so far as related to 150*l.*, that it should be entered for the defendant, and as to the residue for the plaintiff; and he assessed the damages at 14*l.* 4*s.* 9*d.*, the balance which he adjudged to be due to the plaintiff: Held sufficient, and that the arbitrator was not bound to find the first issue distributively.—*Bird* v. *Penrice*, 8 D. P. C. 775.

3. (*Revocation of submission by insolvency.*) Semble, the insolvency of the plaintiff does not operate as a revocation of a submission to arbitration. (4 B. & Ald. 250; 9 B. & C. 659; 8 D. P. C. 281.)—*Hobbs* v. *Ferrars*, 8 D. P. C. 779.

4. (*Award, construction of.*) An award, dated 13th October 1840, ordered the payment of money on "the 28th day of October next:" Held, on motion for an attachment, that the money was payable on the 28th of the same October in which the award was made.—*Brown* v. *Smith*, 8 D. P. C. 857.

5. (*Making submission a rule of Court.*) A motion to make a submission to arbitration a rule of Court must be made on the original submission: if therefore it be in the possession of the other party, the Court will grant a rule calling on him to produce it.—*Lord Boston* v. *Mesham*, 8 D. P. C. 867.

6. (*Conclusiveness of award.*) The parties to a submission are bound by the judgment of the arbitrator in matter of fact and of law, whether he be a legal or a lay arbitrator. (1 C., M. & R. 738; 9 Ves. 364.)—*Huntig* v. *Ralling*, 8 D. P. C. 879.

And see ATTACHMENT, 3; PROCESS, 1; WRIT OF TRIAL, 2.

ASSUMPSIT.

1. (*Consideration—Duress of goods.*) An agreement entered into under duress of goods not void. Therefore where, to debt on an agreement to pay 19*l.* 10*s.*, the defendant pleaded that just before the making of the agreement, the plaintiff had wrongfully distrained goods of the defendant of the value of 20*l.*, under colour of a distress for 19*l.* 10*s.*, whereas only 3*l.* 7*s.* 6*d.* was due, and the plaintiff threatened to sell the goods unless the defendant made the agreement, and the defendant, in order to prevent the sale, entered into the agreement:—Held, that the plea was bad, and judgment was given for the plaintiff non obstante veredicto. Held also, that the withdrawal of the distress was a good consideration for agreement to pay that amount.—*Skeate* v. *Beale*, 3. P. & D. 597.

2. (*Consideration—Discharge of joint debtors.*) Where a plaintiff discharges one of two joint debtors, the other also has a right to be discharged; and therefore, a promise by a third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration.—*Herring* v. *Dorell*, 8 C. & P. 604.

ATTACHMENT.

1. The Court refused to grant an attachment against parties for disobedience of an order of nisi prius, it appearing that they had bonâ fide obeyed the order as far as they were able.—*Clare* v. *Blakesley*, 1 Scott, N. R. 397; 8 D. P. C. 835.

2. To render a party liable to an attachment for not delivering up deeds and papers in his custody, pursuant to a rule or order, it must appear that the demand was made by a person duly authorized.—*Doe d. Hickman* v. *Hickman*, 1 Scott, N. R. 398; 8 D. P. C. 833.

3. On motion for an attachment against an attorney for non-delivery of his bill to a party pursuant to a rule of Court, the affidavit ought to be made by that party himself, that of a third person is not sufficient.—*Potter* v. *Back*, 8 D. P. C. 871.

4. (*For nonpayment of sums awarded.*) An arbitrator, to whom a cause was referred, awarded that the action should cease, and that the plaintiff should pay to the defendant a certain sum. On motion for an attachment, the affidavit stated that the defendant demanded the sum awarded, and also 30*l.* for costs, but that the plaintiff "did not pay the same, or any part thereof," (omitting the words "or either of them"). The Court refused an attachment.—*Payner* v. *Hatton*, 8 D. P. C. 891.

ATTORNEY.

1. (*Admission—Examination.*) A person admitted and practising as an attorney in the Court of Common Pleas at Lancaster, previously to the rule of Easter term, 6 Will. 4, is not entitled to be admitted in the superior Courts at Westminster, without being examined and giving the usual notices, &c.—*Exparte Blackhurst*, 6 M. & W. 693; 8 D. P. C. 770.

2. (*Examination.*) Under special circumstances, the Court will allow an articled clerk to be examined before the expiration of his five years' service.—*Exparte Fulcher*, 8 D. P. C. 614.

3. (*Costs of taxation of bill.*) Where an attorney's bill was reduced on taxation by 3*s.* 4*d.* less than one sixth, the Court would not allow him the costs of taxation. (1 D. P. C. 251; 2 D. P. C. 382.)—*Davison* v. *Allen*, 8 D. P. C. 673.

4. (*Attorney and Client.*) Where money had been paid by a client to one of two attorneys, partners, which had been applied to their own use in account with their bankers, the Court summarily compelled them to refund.—*In re Ford*, 8 D. P. C. 684.

5. (*Costs of taxation of bill.*) Where an executor of the client has obtained an order to refer an attorney's bill for taxation, the Court has authority to compel the executor to pay the costs of the taxation, less than a sixth having been taken off.—*Jefferson* v. *Warrington*, 8 D. P. C. 880.

And see DEBTOR AND CREDITOR.

BAIL IN ERROR.

It is uncertain whether bail in error can be taken before a commissioner in the country, but the Court will not make an order for it to be so taken.—*Williams* v. *Panton*, 8 D. P. C. 701.

BANKING COMPANY.

1. (*Action by public officer of.*) The plaintiff sued as the payee of a note, made payable on demand to "the managers of the National Provincial Bank of England," but did not sue as a public officer: Held that upon proof that he was in fact the manager, and that a demand had been duly made on behalf of the bank, the plaintiff was entitled to recover; and that in the absence of a plea that the bank was established under the provisions of the 7 Geo. 4, c. 46, and that the plaintiff was not the public officer, it was not necessary for the plaihtiff to show that he was, nor competent to the defendant to show that he was not, such public officer.—*Robertson* v. *Steward*, 1 Scott, N. R. 419.

(*Execution against registered officer.*) On a judgment against the registered public officer of a banking copartnership, who is the nominal defendant in the action, execution may issue against him without a sci. fa. *Parke*, B. dubitante.)—*Harwood* v. *Law*, 8 D. P. C. 899.

BANKRUPTCY.

1. (*Retrospective operation of* 6 *Geo.* 4, *c.* 16, *s.* 127.) The 6 Geo. 4, c. 16, s. 127, which enacts that if any person, who shall have been discharged by such certificate as aforesaid, shall become bankrupt, and have obtained or shall hereafter obtain such certificate, unless his estate shall pay 15*s.* in the pound, his future estate shall vest in the assignees under the second commission, does not apply where the second certificate was obtained before the act.

Therefore, where A. had obtained his certificate under a second bankruptcy before 6 Geo. 4, c. 16, it was held a valid defence, in trover for goods, that the

goods were in the disposition of A., against whom a fiat issued in 1836, under which the defendant converted as assignee, although A. had not paid 15*s.* in the pound under the second commission.

Quære, whether, where the act does not apply, a third commission is void. (10 B. &. C. 427; 3 B. & Adol. 338; 4 B. & Adol. 351; 8 Ad. & E. 470; 2 C. & M. 435; 4 Bing. N. C. 290.)—*Benjamin* v. *Belcher*, 3 P. & D. 329.

2. (*Illegal agreement by bankrupt with creditor.*) To assumpsit for goods sold, the defendant pleaded that after the debt was contracted he became a bankrupt, and that a fiat was issued against him on the petition of the plaintiff; that before the defendant was adjudged a bankrupt under the fiat, an agreement was made between them, under which the plaintiff abandoned all proceedings in consideration of the defendant giving him a bill of exchange as a security for part of his debt: Held, on special demurrer, that the plea did not show the debt to be forfeited (within 6 Geo. 4, c. 16, s. 8), as there was no averment that the plaintiff by the agreement had or could have received more than the other creditors, or that the defendant had not assets to pay all his creditors their demands in full, or that the fiat had been proceeded with. (1 M. & W. 159.)—*Davis* v. *Holding*, 3 P. & D. 413.

3. (*When and how far put in issue.*) In an action by assignees of a bankrupt for money had and received by the defendant to their use, the defendant pleaded non-assumpsit, and that the plaintiffs were not assignees modo et formâ, and gave a notice to dispute the bankruptcy. One act of bankruptcy was proved, none other being suggested: Held, that the plaintiffs were not bound to prove the existence of a good petitioning creditor's debt at the date of the act of bankruptcy. (4 Bing. N. C. 290.)—*Porter* v. *Walker*, 1 Scott's N. R. 568.

4. (*Revocation of authority given by bankrupt to factor—Pleading.*) Case.—The declaration, by assignees of bankrupts, stated, that the defendant was a commission agent at Montreal, and that the bankrupts, before their bankruptcy, delivered to him certain goods, which were not to be sold at less than invoice prices; that at the time of the bankruptcy a large quantity of these goods remained in the defendant's hands unsold; that the plaintiffs, being assignees of the bankrupts, directed the defendant not to sell the goods at less than invoice prices, until he had rendered to them an account of the goods, and the plaintiffs had been enabled to judge, and had determined and given the defendant notice, whether they would redeem the goods without sale or not. Breach, that the defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although the defendant, after the rendering of the account, and before the sale, was required by the plaintiffs, and they gave him notice, *to send the goods to England*, and that they would redeem them without sale. The defendant pleaded, that after the bankrupts had caused the goods to be delivered to him, and before and at and after their bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods; that the bankrupts, before their bankruptcy and after the delivery of the goods, in consideration of the advances by the defendant, agreed with the defendant that he should sell the goods at the best market prices, and realize thereon against his said advances; that the defendant, relying upon the authority to him to sell and realize against his said advances, permitted his advances to remain unpaid for a long time, to wit, until and at and after the bankruptcy; that after the bankruptcy, and after the defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did

not tender or offer to pay the defendant his advances or lien, or to redeem the goods before the defendant should part with them, and the said goods so remaining on hand were then deteriorating and depreciating in price, and the market getting worse; wherefore he the defendant, exercising his best judgment for the estate of the bankrupts, and the plaintiffs as assignees, and to realize his advances, after he was required to send the goods to London to be redeemed, sold the said goods at the best market prices, according to the said authority of the bankrupts to him in that behalf, using his best judgment therein, as he lawfully might: and after giving credit for the proceeds under such sale, there still remained due to the defendant a large sum of his said advances, and the estate of the bankrupts, and the plaintiffs as assignees, were still indebted in a large amount on account of the advances: Held, first, that the breach did not, by alleging that the plaintiffs gave the defendant notice *to send the goods to England*, render the declaration bad; secondly, that the plea was bad, as it showed no consideration for any agreement which deprived the bankrupts or the assignees of their right to revoke the authority to the defendant to sell.—*Raleigh* v. *Atkinson*, 6 M. & W. 670.

5. (*Determination of covenants by bankruptcy of lessee.*) The defendant, by indenture, demised to E. & W. a fulling mill for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bankrupt, and their assignees declined to take the lease: but they required the defendant to appoint a person to value the machinery, and on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the orginal valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay: Held, that the assignees (having demanded the machinery) were entitled to recover it in trover, and that their remedy was not by an action on the covenants, which had been determined by the bankruptcy, and by their refusal to take the lease. (2 B. & Adol. 716.)—*Fairburn* v. *Eastwood*, 6 M. & W. 679.

6. (*Retrospective operation of* 2 & 3 *Vict. c.* 29.) The stat. 2 & 3 Vict. c. 29, has a retrospective operation, so as to protect the sheriff from liability, in respect of a bonâ fide execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards. (6 M. & W. 285.)—*Nelstrop* v. *Scarisbrick*, 6 M. & W. 684; 8 D. P. C. 747.

7. (*Staying proceedings, in action for debt barred by certificate.*) If a defendant is guilty of unreasonable delay in availing himself of his certificate, the Court will not relieve him by staying proceedings. (1 M. & W. 550.)—*Sharp* v. *D'Almaine*, 8 D. P. C. 664.

BILL OF LADING.

A bill of lading by which goods are made deliverable to A. B. is revocable until the goods or bill of lading are delivered to A. B.; the shipper of the goods, therefore, may change his purpose, and make the goods deliverable to any one else.

M., a planter in Jamaica, was in the habit of receiving supplies from the de-

fendant, a merchant in England, who was accustomed to send out his vessels with supplies to M. and other planters, and receive from them consignments in return. In March one of the defendant's vessels arrived in Jamaica, and M. wrote to the defendant that he should send 150 hogsheads of sugar from A. M. estates, besides other produce, which he directed the defendant to insure, and he also advised him that he had drawn on him on account of A. M. estate. The defendant had an account with M. in respect of this estate. The defendant insured accordingly, and paid the draft of M. on the 4th April. M. shipped the goods on board the defendant's vessel, and the master signed a bill of lading, by which they were made deliverable to the defendant.

The sugars in question had been raised by the aid of capital supplied by the plaintiff; and on the 5th April M. promised the plaintiff to secure him out of the produce of the A. M. estate; and on the 6th April he indorsed on the bill of lading that the sugars were to be delivered to the defendant, on condition that he would pay the bill for advances made by the plaintiff, otherwise the sugars to be delivered to him, and M. delivered the bill of lading to the plaintiff. On the arrival of the goods in London, the defendant refused to comply with the condition indorsed on the bill of lading. M. was indebted to the defendant in a large amount, but he held securities for the debt; he was also indebted to the plaintiff to an amount greater than the value of the sugar: Held, that the property had not vested in the defendant, either by the bill of lading or by delivery on board the defendant's ship, or by his payment of the insurance; held also, that M. had the right to make the special indorsement on the bill of lading, and that the goods vested in the plaintiff on the defendant's refusal to comply with the condition.—*Mitchel* v. *Ede*, 3 P. & D. 513.

BILL OF EXCEPTIONS.

(*When amendable.*) Where a bill of exceptions stated the direction of the judge to the jury, and that *thereupon* the jury gave their verdict for the plaintiff, *whereupon* the counsel for the defendant did except, &c.: Held, that an amendment might be made after the judge's seal had been affixed, by stating the exceptions to have been made before the verdict was delivered.—*Culley* v. *Doe* d. *Taylerson*, 3 P. & D. 539.

BILLS AND NOTES.

1. (*Notice of dishonour.*) The following is a good notice of dishonour: "I beg to inform you that A. B.'s acceptance for 200*l.*, drawn and indorsed by you, due July 31, has been presented for payment and returned, and now remains unpaid." (2 M. & W. 799; 2 P. & D. 278.)—*Cook* v. *French*, 3 P. & D. 596.

2. (*Title of indorsee—Consideration.*) The defendants, who were commission agents at Liverpool, were in the habit of receiving bills of lading from K. in Ireland, of goods consigned to Liverpool, against which K. drew bills, and the defendants accepted them. On depositing the bill of lading and the bill of exchange with plaintiff's bankers at Dublin, their course of business was to make advances thereupon, and to remit the bill of exchange for acceptance to the defendants, accompanied by the bill of lading, indorsed by themselves. On one occasion the plaintiffs discounted a bill as usual on receiving a bill of lading, and remitted it to the defendants, who accepted the bill of exchange, but, the bill of lading turning out to be a forgery by K., refused to pay their acceptance: Held, that they were liable upon it to the plaintiffs, who were indorsees for valuable consideration.—*Reynolds* v. *Robertson*, 3 P. & D. 611.

3. (*Consideration.*) Plea, to assumpsit on a promissory note, that it was made and delivered by the defendant to the plaintiff for the purpose of the plaintiff paying, on account of the defendant, certain debts due by the defendant to third persons; that the plaintiff received it for that purpose and no other, and promised defendant to pay them, but had not done so, and that the defendant was still liable to pay them; and that the defendant had received, and the plaintiff had given, no consideration for the note. Replication, that the defendant, at the request of such third persons, made and delivered the note to the plaintiff, and the plaintiff received it at their request, for the purpose of paying them, so soon as the defendant should have paid the note, absque hoc that the plaintiff promised the defendant to pay them as in the plea alleged. Issue thereon: Held, on motion to arrest the judgment, that there appeared a good consideration for the note, and that the plaintiff was entitled to judgment.—*Cole* v. *Cresswell*, 3 P. & D. 404.

4. (*When suable on, in debt.*) Debt may be brought by the payee against the maker of a note, or by the drawer of a bill payable to himself against the acceptor, although the instrument expresses no consideration, either by the words "value received" or otherwise. (1 B. & C. 674; 2 D. P. C. 635; 3 D. P. C. 243; 3 Price, 253.)—*Hatch* v. *Trayes*, and *Watson* v. *Kightley*, 3 P. & D. 409.

BIRTHS' REGISTRATION ACT.

The 6 & 7 Will. 4, c. 86, which enacts that the father or mother of a child, or in the case of their illness or absence, the occupier of the house in which the child shall have been born, shall, within forty-two days after the birth, give information of the particulars thereof to the registrar, upon request, is imperative, and the party disobeying it is liable to indictment.

Admitted, that the acting in the office is primâ facie evidence of the appointment as registrar.—*Reg.* v. *Price*, 3 P. & D. 421.

BURIAL FEES.

Before the passing of the stat. 51 Geo. 3, c. 151, the incumbent or *minister* of the parish of St. Marylebone, (which was a lay rectory), by himself or his curates, performed the duty on all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. By that act, the vestry of the parish were empowered to provide an additional cemetery for the parish, and erect a chapel thereon; and by sect. 41, the lay rector was empowered to appoint a *burying minister*, to officiate in burying the dead in the said cemetery, a *reader* to perform divine service, and preach in the chapel, and (if it should seem right to the vestry) another minister to be *preacher* in the chapel; such *reader* and *preacher* to receive for their salaries such sums as the vestry should appoint. By sect. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto. By a subsequent act, 1 & 2 Geo. 4, c. 21, (for effectuating the building of four district churches within the parish), it was enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes: and the plaintiff was subsequently appointed rector of the parish. By the 6 Geo. 4, c. 124, (whereby the four districts were made district rectories for certain purposes), the district rectors were empowered (sect. 6) to solemnize marriages and baptisms, and take all fees for the same; but (by sect. 9) nothing therein contained was to alter or affect the law respecting burial or burial fees within the parish.

In 1824, W. was presented by the Crown (in whose hands the lay rectory then was) *to the chapel* built under the provisions of the 51 Geo. 3, c. 151, and thenceforth performed all the burials there, and received the burial fees, which he paid over to the plaintiff, the rector, until the year 1839; when the defendant, by direction of the vestry, received and retained them: Held, that the plaintiff was entitled to recover the amount of such fees, in an action for money had and received.—*Spry* v. *Emperor*, 6 M. & W. 639.

CANAL COMPANY. See MANDAMUS, 3.

CERTIORARI. See ORDER OF JUSTICES.

CHARTER-PARTY.

(*Construction of.*) By a charter party, the vessel was to sail from London with a cargo for Kingston or any other port of Jamaica, and, having discharged the same, receive on board a cargo from thence or from a port on the Spanish Main, if required, and deliver the same at a port in the united kingdom: freight to be paid—250*l.* in ten days after sailing from Gravesend, and 750*l.* more in two months after a right delivery of the homeward cargo at her port of discharge in the united kingdom, provided she should be required to proceed to *one* port only in Jamaica, and 25*l.* more should she be required to go to *two* or more ports in that island; and in case the vessel should be ordered to the Spanish Main, 4*l.* per day was to be paid for every day after the twenty-fifth day after her arrival in Jamaica, until despatched from her loading port: demurrage, 100*l.* per month or in proportion for a less period, payable on settlement of the hire of the vessel. The vessel sailed from London, and discharged a portion of her outward cargo at Kingston, and the residue at another port in Jamaica, and sailed thence to a port on the Spanish Main to receive a homeward cargo, and there remained 139 days beyond the stipulated twenty-five days: Held, that the 4*l.* per day were not payable until two months after the delivery of the homeward cargo at the ship's port of discharge in the united kingdom.—*Crozier* v. *Smith*, 1 Scott N. R. 339.

CHURCH RATES.

An order of justices for the payment of a church rate, under 53 Geo. 3, c. 127, made on a complaint of churchwardens de facto though not de jure, is good; and their jurisdiction is not ousted by the fact of a suit having been commenced in the Consistorial Court by churchwardens, where the suit had been abandoned before the complaint was made.—*Reg.* v. *Justices of St. Clement, Ipswich*, 3 P. & D. 481.

And see ECCLESIASTICAL COURT.

COGNOVIT.

(*Attestation.*) The mere circumstance of a plaintiff's attorney mentioning the name of another attorney to the defendant, is no ground of objection to a cognovit, under the 1 & 2 Vict. c. 110, s. 9, if the defendant freely adopts him. Nor is it of itself any objection to its validity, that the plaintiff has paid for the attendance of the attorney to attest it on behalf of the defendant. (3 D. P. C. 266; 7 D. P. C. 166, 742; 8 D. P. C. 242.)—*Pease* v. *Wells*, 8 D. P. C. 626.

And see WARRANT OF ATTORNEY.

COPYHOLD.

(*Surrender.*) The steward of a manor is not bound to accept a general surrender of copyhold tenements, without describing particularly what the tenements are,

although the proposed surrender refers to a previous surrender, in which there was a description of the tenements.

Semble, it is a good custom for the steward to prepare all surrenders in a manor, for a *reasonable* fee. (2 B. & Ald. 550.)—*Reg.* v. *Lord of the Manor of Bishop's Stoke*, 8 D. P. C. 608.

COSTS.

1. (*Security for.*) Where an action of trespass appeared to have been brought by a man in very humble circumstances, and at the instigation and at the costs of his landlord, the Court ordered the latter to give security for the defendant's costs.—*Ball* v. *Ross*, 1 Scott N. R. 217.

2. (*Same.*) The plaintiff having gone to reside abroad after the cause was set down in the demurrer paper, the Court directed security for costs to be given, in the event of the demurrer being decided in his favour.—*Kemble* v. *Mills*, 1 Scott N. R. 402; 8 D. P. C. 836.

3. (*Of making judge's order rule of Court.*) Upon a judge's order, discharging a summons with costs, the costs were taxed and demanded, and not being paid or tendered, the order was made a rule of Court. The costs of making it a rule of Court were also taxed, and both sums were separately demanded. The party tendered the former amount, but refused payment of the latter: Held, that he was not liable to an attachment, the costs of making the order a rule of Court not being costs within the meaning of the order and rule.—*Reg.* v. *Gameson*, 6 M. & W. 603; 8 D. P. C. 795. [But see now the resolution of the judges, 24 L. M. 424.]

4. (*Certificate under* 43 *Eliz.*) Where, in an action for assault and battery, the plaintiff recovered less than 40*s.* damages, and the judge, at the trial, intimated his intention of certifying to deprive the plaintiff of costs, under the 43 Eliz. c. 6, but after four days the plaintiff obtained the record from the associate, no certificate being indorsed on it, and signed judgment, and the master, on production of the record, taxed the plaintiff his costs; the Court confirmed an order of the judge, for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation.—*Davis* v. *Cole*, 6 M. & W. 624; 8 D. P. C. 732.

5. (*On recovery under* 20*l.*) In debt for a sum above 20*l.*, the defendant pleaded a tender as to part, and nunquam indebitatus as to the residue. The plaintiff confessed the tender, and at the trial had a verdict for 13*l*, which, together with the sum tendered, exceeded 20*l.*: Held, that the plaintiff was entitled to costs on the lower scale only. (2 Harr. & Woll. 82; 5 D. P. C. 385.)—*Dixon* v. *Walker*, 8 D. P. C. 887.

And see Ejectment, 3; Practice, 6; Covenant; New Trial, 1.

CUSTOM.

Where the return to a mandamus to admit an alderman of the city of London, stated an immemorial custom for the court of mayor and aldermen to determine whether a person elected alderman was, according to their discretion and conscience, a fit and proper person duly qualified, on traverse of the custom, the jury found that the custom had existed from time immemorial down to 1689: Held, that this finding amounted to a verdict that the custom still existed. Held also, that although a jury may find an issue in special terms, the parties are not entitled to have it entered as a special verdict, unless disputed questions of law are raised

by the finding. (See Rex v. Johnson, in Dom. Proc., 1 M'Lean & Rob. 1.)—*Scales* v. *Key*, 3 P. & D. 505.

DEBTOR AND CREDITOR.

(*Composition deed.*) Where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates for their respective debts, stipulated, without their knowledge, for a bill of exchange to be indorsed to him by the defendant for a further sum, the whole agreement between the plaintiff and defendant is void, as being fraudulent upon the other creditors, and the latter cannot recover upon the defendant's bills for amount of composition money, even although he received nothing on the bill indorsed to him by the defendant.—*Howden* v. *Haigh*, 3 P. & D. 661.

DEED.

1. (*Reservation of right of way, construction of.*) A deed reserved to the defendant a right of way over a yard "to the stable and loft over the same, and the space or opening under the loft, and now used as a wood-house," and also the use of the yard "in common with the plaintiff and his tenants for the time being, it being the intent that the whole of the yard should lie open and undivided as the same then was, without any other building to be erected thereon, and that the yard should be used in common by the occupiers of the plaintiff's and defendant's messuages, in the same manner as the tenants thereof had been accustomed to use the same."

The defendants converted the loft and the space there used, which had been used as a wood-house, into a cottage.

Held, 1, That the deed did not justify the defendant in using the yard after the cottage was built, for that such user was not the accustomed user which had been reserved.

2, That the reservation of the way "to the space or opening under the loft, and now used as a wood-house," was to be taken as identifying the locality, and confining the way to a piece of open ground generally, and not specifically to a wood-house; but that the conversion of the open space to a cottage was an alteration of substance, and that the defendant had no right of way to the cottage.—*Allan* v. *Gomme*, 3 P. & D. 581.

2. (*Proof of enrolment.*) To prove the enrolment of a deed under the 9 Geo. 2, c. 36, the deed was produced with the following memorandum indorsed thereon: "Enrolled in his majesty's High Court of Chancery the 17th day of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." Evidence was given that Mr. Drew was a person who at the time of the trial acted as the clerk of the enrolments in the Court of Chancery, and that on the memorandum being produced to him a short time before the trial, at the Six Clerks' Office, which is under the sams roof as the Enrolment Office, Mr. Drew acknowledged the name to be his signature: Held, sufficient; the memorandum having been made by the proper officer, in the execution of his duty.—*Doe* d. *Williams* v. *Lloyd*, 1 Scott, N. R. 505.

DETINUE. See PLEADING, 18.

DEVISE.

1. (*What carries estate tail.*) Under the following devise, "I give and bequeath to my sister all my estate or estates in, &c., during her natural life, twelve months after my decease, and after her decease to her son James, and his heir

male living to attain the age of twenty-one years, and in case of no such heir male lawfully begotten, then to such issue and issues female and females, 200*l.* share and share alike; and in case no such male or female living then the 200*l.* to the children of my sister; and the inheritance of the said estate, for want of such issue male as aforesaid, to redound to my heir male with paying the 200*l.*" James takes an estate tail.—*Doe* d. *Tremewen* v. *Permewan*, 3 P. & D. 303.

2. (*When it passes a fee.*) A fee was held to have passed by the following devise: "I give and bequeath to my wife all my lands, messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever." It did not appear whether or not the testator at any time was possessed of personal property.—*Doe* d. *Booley* v. *Roberts*, 3 P. & D. 578.

3. (*Estate tail.*) Devise to S. C. for life, remainder to the *eldest son* of S. C., but for want of *such* issue, then to his daughter or daughters, share and share alike, for ever; but, in case S. C. had no issue, then to hold to him, his heirs and assigns for ever: Held, that S. C. took an estate in tail *general*.—*Doe* d. *Burrin* v. *Charlton*, 1 Scott, N. R. 290.

4. (*When sufficient to pass reversion.*) J. H., by a settlement made on his marriage, 1740, settled certain estates to the use of himself for life, remainder to his wife for life, in bar of dower, remainder to his first and other sons in tail, remainder to his daughters in tail, with an ultimate remainder to the settlor, his heirs and assigns for ever: and the settlor had a power to appoint a sum of 2000*l.* or any part thereof by will amongst the children of the marriage. J. H. had issue by his marriage three sons, J. H., J. F. H. and D. H. and two daughters, L. H. and J. H. By his will, dated in 1782, J. H. devised to his second son J. F. H. certain estates in Cornwall, and to his third son, D. H., all other his manors, messuages, &c. whatsoever and wheresoever, of which he had power to dispose, to hold to him, his heirs and assigns for ever. To his daughters he gave legacies of 3000*l.* and 1500*l*, directing that the above devises and bequests to his said sons and daughters, should be in full of all claims they might have or be entitled upon or out of his estate, real or personal, under his marriage settlement or otherwise; and after reciting that, under the settlement, he had power to appoint 2000*l.* to and amongst his children as he should judge proper, he gave to his eldest son, J. H., five guineas, part thereof "in full of his share of the said sum of 2000*l.*, and of all claims he has or can make under my marriage settlement or otherwise, save in regard to the real estates which were settled upon him by my marriage settlement, and over which I have no power:" and he gave all the rest and residue of his estate and effects whatsoever and wheresoever, including the remainder of the said sum of 2000*l.*, to his wife. D. H., the third son, died in 1804, and J. F. H., the second son, in 1821, neither having had issue. L. H., the eldest daughter, died unmarried in 1818, and T. H., the second daughter, died in 1824, without having had issue. J. H., the eldest son, died in 1838: Held, that the reversion in fee, limited by the settlement to the settlor, passed by his will to D. H., his third son, the words being large enough to pass the reversion, and there being nothing on the face of the will to manifest an intention that it should not pass.—*Doe* d. *Howell* v. *Thomas*, 1 Scott, N. R. 359; 1 M. & G. 335.

DISTRESS.

(*Impounding—Tender of rent and costs of distress.*) The agent of the landlord went into a field on the farm where the tenant's cattle were feeding, and placing

his hand upon one of the beasts, said he distrained the whole for the rent due, counted them, and took a note of the particulars, and then went away; on the following morning he left with the tenant a notice stating that he had distrained the cattle thereunder mentioned, and had impounded them on the premises: Held, that this constituted an impounding, and that a subsequent tender of the rent and costs of distress was too late. (Maule, J. dissentiente.)—*Thomas* v. *Harries*, 1 Scott, N. R. 524.

DOCK COMPANY.

(*Action for calls.*) By the 84th section of the act of incorporation of the Southampton Dock Company, it is enacted, amongst other things, that in an action against a shareholder for calls, "in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the company is by the act directed to enter and keep a list of the names and additions and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be primâ facie evidence that such defendant is a proprietor, and of the number or amount of his shares therein:" and by section 89, the company are required "from time to time to cause the names and additions and places of abode of the several persons who shall be from time to time respectively entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the secretary of the said Company: Held, that this latter clause was directory only, and that a failure literally to comply with the directions as to the mode of making the entries, as an omission to insert the numbers of the shares or the addresses of some of the proprietors, did not render the book inadmissible in evidence: Held, also, that it was not necessary that the entries should be made by the hand of the secretary. The 63d section enacts, that "the minutes or entries thereinafter provided to be kept of the orders and proceedings of the directors, when signed as thereinafter ordered, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, and before all judges, justices, and others, and that without proof of such meeting having been duly convened, or of the persons making or entering such orders or proceedings being proprietors or directors of the said company, as the case may be:" and the 75th section enacts, "that the said directors shall keep a regular minute and entry of the orders and proceedings at every meeting of the said directors, which shall be *signed by the chairman at each respective meeting*:" Held, that a signature by the chairman, at a subsequent meeting, at which the minutes of the former meeting were read over and confirmed, was a sufficient compliance with the act: Held, also, that it was competent to a "court of directors" to make calls, and that a general meeting of the directors need not be convened for that purpose. And that the company were entitled to recover interest upon the arrears due for calls, without adding a count for interest.—*Southampton Dock Co.* v. *Richards*, 1 Scott, N. R. 219.

ECCLESIASTICAL COURT.

(*Writ de contumace capiendo, form of.*) A significavit, under 53 Geo. 3, c. 127, s. 1, need not appear on the face of it to have been issued within ten days of the party having been pronounced in contempt, as it will be presumed to have been so issued, and no such statement is contained in the form of significavit given by the act.

Nor is a significavit vitiated by the introduction of merely superfluous words, not contained in the statutable form, viz., by the addition of the words "as by our citation he was required to appear" after the statement that the party has been pronounced in contempt.

As the ecclesiastical courts have general jurisdiction in matters of church rate, it is unnecessary, notwithstanding 53 Geo. 3, c. 127, that it should appear from the proceedings in a subtraction of the church rate cause, either that the amount of the rate exceeded 10*l.*, or that its validity was disputed.

Quære, whether, where the rate does not exceed 10*l.*, and its validity, &c. is not disputed, the magistrates have exclusive jurisdiction.

A writ de contumace capiendo need not give the defendant any addition, where he is imprisoned under it for contempt in not appearing to a citation, such imprisonment being "a pain or forfeiture," within 5 Eliz. c. 23, s. 13.

By the bishop's inhibition during his visitation, the jurisdiction of his commissary is superseded, and a party resident within the commissary's jurisdiction may then be cited before the bishop's official principal. The appointment of commissary for a district does not make it a peculiar.—*Reg.* v. *Thorogood*, 3 P. & D. 629.

And see PROHIBITION, 1.

EJECTMENT.

1. (*Letting in defendant to defend as landlord.*) In ejectment, a party may be let in, on terms, to defend as landlord, after judgment has been signed against the casual ejector, and a writ of possession has been executed.—*Doe* d. *Mullarky* v. *Roe*, 3 P. & D. 316.

2. (*Declaration—Title.*) An error in the title of the declaration, such as entitling it of a term not yet arrived, will not prevent the lessor of the plaintiff from moving for judgment; even though the notice has no date. (6 D. P. C. 184.)—*Doe* d. *Green* v. *Roe*, 8 Scott, 385.

3. (*Costs.*) A rule nisi for judgment having been served upon several parties who were not shown to be in any way connected with the premises, some of them appeared: Held, that they were entitled to reasonable costs.—*Doe* d. *Tansley* v. *Roe*, 1 Scott, N. R. 401.

4. (*For canonry.*) The defendant, one of the canons of "the king's free chapel of St. George, within his castle of Windsor," demised, by way of mortgage, for ninety-nine years, if he should so long live and continue a canon, "all that the canonry of him, the defendant, (describing it,) and all glebes and other lands, messuages, tenements, and hereditaments belonging thereto, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances, to the canonry belonging, and all the estate, right, title, and interest of him, the defendant, in and to the said premises and every part thereof." It appeared in evidence, that there was no estate specifically belonging to the canons in severalty, but that the whole property and revenues of the college were vested in the dean and chapter, and were divided periodically in certain proportions amongst its members; and that there were houses assigned for residences for the canons; no given house being attached to each canonry, but on a vacancy occurring, the several canons, according to seniority, having a right of choice of the vacant house, though the defendant had in fact retained the house he went into on his installation: Held, that ejectment would not lie either for the canonry or for the defendant's house of residence: Held, also, that the defendant was not estopped

by the deed from denying that the house of the residence did not belong to the canonry.—*Doe* d. *Butcher* v. *Musgrave*, 1 Scott, N. R. 451.

5. (*Service—Title of declaration.*) The omission of the name of the court, in the title of the declaration, is immaterial, if the notice give the requisite information. —*Doe* d. *Tattersall* v. *Roe*, 8 D. P. C. 612.

6. (*Service.*) Service of a declaration in ejectment on a railway company, effected according to the mode prescribed by the Railway Act, entitles the lessor of the plaintiff to a rule for judgment absolute in the first instance.—*Doe* d. *Bromley* v. *Roe*, 8 D. P. C. 858.

7. (*Same.*) An affidavit of service in ejectment, omitting the year, insufficient.—*Doe* d. *Foster* v. *Roe*, 8 D. P. C. 784.

ESCAPE.

In debt by the assignee of A., a bankrupt, against the marshal, for an escape, after the choice of assignees of a prisoner in execution at the suit of A. before his bankruptcy, the defendant pleaded, that before the marshal had notice of the bankruptcy, the attorney of A., the plaintiff in the action, did, as such attorney, require and direct him to discharge the prisoner out of custody; and, as such attorney, did give licence to the marshal for the discharge; and that the marshal, before notice of the bankruptcy, in pursuance of such requirement and direction, discharged the prisoner: Held, on demurrer, that the plea was no answer to the action, as it did not show any sufficient power in the attorney, as such, to authorize the discharge. For the plaintiff's attorney on the record has no authority, by virtue of his retainer, to discharge a defendant in execution out of custody.—*Savory* v. *Chapman*, 3 P. & D. 604; 8 D. P. C. 656.

And see DEBTOR AND CREDITOR.

EVIDENCE.

1. (*Admission of copy of instrument under judge's order.*) Although a judge's order has been made on the plaintiff to admit a copy of a letter from himself to the defendant, and the plaintiff has also had notice to produce the original, the copy cannot be read, unless evidence is given of the existence of the original.

Whether the notice to admit contains a saving of all just exceptions or not, the opposite party is entitled to rely on any valid objection to the documents mentioned in the notice.—*Sharpe* v. *Lambe*, 3 P. & D. 454.

2. (*Deposition of living person.*) Where the plaintiff claimed to hold land under A. B., and on a previous charge of malicious trespass on the land, before the petty sessions, had called A. B. as a witness, who however disproved the tenure: Held, that the deposition of A. B. was admissible in evidence against the plaintiff, although A. B. was alive. (2 P. & D. 403.)—*Cole* v. *Hadley*, 3 P. & D. 458.

3. (*Admissibility of parol evidence.*) A witness called to prove the terms of a verbal agreement, stated that he was in company with the plaintiff and defendant when it was entered into, and referred to an entry which he made a few hours afterwards to refresh his memory. This entry was made by him from a paper written in pencil by the plaintiff, during the interview between the parties, and read by him to the defendant, as embodying the terms of their agreement. The defendant assented to it, but he neither signed nor was asked to sign it, nor was it shown to him: Held, that it was not necessary to produce this paper as constituting the real agreement.—*Trowhitt* v. *Lambert*, 3 P. & D. 676.

4. (*Of handwriting.*) In an action against the acceptor of a bill of exchange, the only proof of his handwriting was that of a banker's clerk, who stated that two years ago he saw a person calling himself by the defendant's name sign a book; that he had never seen him since, but he thought the handwriting was the same; and that he had since seen cheques similarly signed pass through the bank: Held, that this was evidence to go to the jury.—*Warren* v. *Anderson*, 8 Scott, 384.

5. (*Admission of defendant.*) A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause. (1 Ry. & M. 187; 5 C. & P. 542.)—*Slatterie* v. *Pooley*, 6 M. & W. 664; *Newhall* v. *Holt*, id. 662.

And see LEASE, 1.

FACTORS' ACT.

(*Construction of s. 2—Meaning of* intrusting—*Right of factor to pledge documents.*) The plaintiffs, owners of a cargo of tobacco, on the arrival of the vessel, placed the bill of lading (indorsed in blank) in the hands of W., as their factor, for sale. W. entered the goods at the Custom-house in his own name, and (before the cargo was weighed, and without the plaintiffs' knowledge) obtained a dock-warrant for it in his own name. W. had previously agreed with the defendants for the advance to him (W.) of £20,000, on the deposit of other dock-warrants as a security. The defendants, thinking that security insufficient, refused to advance more than £12,000; whereupon W. pledged with him the dock-warrant of the plaintiffs' tobacco, as a security for, and obtained thereon, the remaining £8000: Held, that, under these circumstances, it did not sufficiently appear that W. was *intrusted* with this dock-warrant, within the meaning of the Factors' Act, 6 Geo. 4, c. 94, s. 2, and therefore that the plaintiffs were entitled to recover from the defendants the proceeds of the tobacco, which was sold by the defendants on W.'s becoming bankrupt.

In order to make the factor a party *intrusted* with the dock-warrant, within the meaning of the act, it must appear that the owner of the goods *intended* that the factor should be possessed of it at the time of the pledge, or that he should exercise the power, which the possession of the bill of lading gave him, of obtaining the dock-warrants whenever he in his discretion might think fit.

The defendants had advanced to W. a sum of £14,000, on the deposit of American state bonds. W. & C. afterwards entered into partnership, and agreed with the defendants, in consideration of their discounting W. & C.'s acceptances for £14,400, to deposit with them as a security dock-warrants for goods held by them. W. & C. accordingly deposited with the defendants the dock-warrant of another cargo of tobacco belonging to the plaintiffs, which they had taken out in their own names, under similar circumstances with the former. The defendants gave up to W. the American bonds, and paid over to W. & C. the balance, after deducting the debt due to them from W., and the discount: Held, that if, according to the intention of both parties, the £14,400 was to be placed entirely at the disposal of W. & C., to apply it to any purpose of their own as they pleased, and they directed its payment in account to the defendants in satisfaction of W.'s debt, this was an advance of money to W. & C. within the meaning of the 6 Geo. 4, c. 94, s. 2; but if their intention was, that the new advance was only for the purpose of satisfying W.'s former debt, and it would not have been

made, except upon the understanding that it should be so applied, and the application of it otherwise would have been a breach of the agreement, then it was not an advance within the statute.—*Phillips* v. *Huth*, 6 M. & W. 572.

FINES AND RECOVERIES ACT.

The stat. 3 & 4 W. 4, c. 74, s. 33, applies only to equitable estates of tenants in tail of lands held *by copy of court roll*. The Court therefore refused a mandamus to the lord of a manor, commanding him to enter on the court rolls an indenture touching certain *customary freehold* hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed by which they were granted.—*Reg.* v. *Lords of the Manor of Ingleton*, 8 D. P. C. 693.

GAMING.

The judgments made void by the statutes against gaming (16 Car. 2, c. 7, & 9 Ann. c. 14), are judgments given by the loser to the winner, or to some one for his benefit, as a security for money lost, and do not include judgments by a bonâ fide indorsee of a negotiable instrument given originally for a gaming debt. Therefore, when N. accepted a bill for a debt lost at play, and the drawer indorsed it for value to the plaintiff, who sued N. and obtained from him a cognovit and entered up judgment thereupon: Held, that the judgment was valid, and that in an action against the marshal for an escape the latter could not rely on the above statutes as a defence to the action.

Semble, if the judgment had been null and void, it would have been a good defence to the marshal, although N., the acceptor of the bill, had not availed himself of the statutory defence, when sued upon it.—*Lane* v. *Chapman*, 3 P. & D. 668.

GUARANTEE.

1. The case of *Haigh* v. *Brooks*, 10 Ad. & E. 309, 2 P. & D. 477 (23 L. M. 162), was affirmed on error in the Exchequer Chamber.—*Brooks* v. *Haigh*, 10 Ad. & E. 323.

2. (*When continuing.*) "In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200: Held, a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than £200 had been supplied to and paid for by V. (12 East, 227; 2 Campb. 412; 3 Campb. 220; 2 C. & J. 13; 6 Bing. 244; 9 Bing. 618; 1 C. & M. 68.)—*Mayer* v. *Isaac*, 6 M. & W. 605.

HIGHWAY.

1. Where an information laid under 5 & 6 Wm. 4, c. 50, s. 94, that a highway is out of repair, and the magistrates, pursuant to that section, appoint a viewer, who reports it out of repair, the magistrates at the special sessions are not bound by that report, but may exercise their discretion whether they will convict the surveyor or not.—If certain magistrates attending at special sessions do not take part in a decision at the sessions, they ought not to be brought before the Court of Queen's Bench on an application for a mandamus in respect of that decision.—*Reg.* v. *Justices of Wilts*, 8 D. P. C. 717.

2. Under 2 & 3 Vict. c. 81, s. 1, a special sessions have jurisdiction to make an order on the parish surveyor of the highway, to pay a certain sum to the trustees

of a certain turnpike road, although all the funds of the turnpike trustees are not exhausted.—*Reg.* v. *Justices of Berks*, 8 D. P. C. 726.

HUSBAND AND WIFE.

1. (*Allegation of promise in action against.*) To a declaration in assumpsit for work and labour against several defendants, charging the promise to have been made by the defendants generally, the defendants pleaded in abatement the non-joinder of two others, the Court refused to arrest the judgment, on the ground that one of the defendants was a feme covert sued jointly with her husband, and the declaration did not state that the promise was made by her before the marriage—the ambiguity in the declaration being aided by the plea.—*France* v. *White*, 1 Scott, N. R. 604.

2. (*Right of husband to restrain liberty of wife.*) Where a wife absents herself from her husband, not on account of any misconduct on his part, and he afterwards, by stratagem, obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty until she is willing to return to a performance of conjugal duties.—*In re Cochrane*, 8 D. P. C. 630.

3. Goods bought by a married woman out of the proceeds of property vested in trustees for her sole and separate use, may be taken in execution on a judgment against her husband. (Vin. Abr., Baron & Feme, F. 2.)—*Carne* v. *Brice*, 8 D. P. C. 884.

INFANT.

(*Necessaries—New trial.*) In an action against an infant, an Oxford student, for hire of horses, &c., the jury having, contrary to the opinion of the judge, found for the plaintiff upon an issue whether they were necessaries or not, the Court granted a new trial *without costs*.—*Harrison* v. *Fane*, 1 Scott, N. R. 287.

And see PLEADING, 3.

INFERIOR COURT.

1. The Court of the mayor of the borough of Liverpool is an inferior and not a superior Court; and therefore a plea that there is another action pending for the same cause in that Court, is no answer to an action in the superior Courts.—*Laughton* v. *Taylor*, 6 M. & W. 695; 8 D. P. C. 776.

2. (*Removal of judgment from.*) Where a judgment has been removed from an inferior jurisdiction, pursuant to 1 & 2 Vict. c. 110, s. 22, the Court will not inquire into the regularity of the proceedings of the Court below, previous to the judgment.—*Simons* v. *Count De Wints*, 8 D. P. C. 646.

INSOLVENT.

1. (*Discharge of, on tender of debt and costs.*) Where a creditor, on his petition to the Insolvent Debtors' Court under the 1 & 2 Vict. c. 110, s. 36, has obtained an order, under s. 37, vesting the estate of the debtor in the provisional assignee, the creditor is not bound, on the debtor afterwards tendering him the debt and costs, to assent to his discharge from custody; nor will the Court of Queen's Bench order such discharge as to that creditor's action, on affidavit of such tender and refusal. (4 B. & C. 26.)—*Drury* v. *Hounsfield*, 11 Ad. & E. 101.

2. (*Capias against remanded insolvent.*) A writ of capias may issue without a judge's order or a writ of summons, against a prisoner remanded by the Insolvent Court, under 1 & 2 Vict. c. 110, s. 85. (5 M. & W. 28.)—*Growcock* v. *Waller*, 11 Ad. & E. 165.

3. (*Liability of, after discharge.*) The defendant was indebted to the plaintiff in 11*l.*, and afterwards discharged from the debt under the Insolvent Debtors' Act, he afterwards accepted a bill of exchange, drawn by the plaintiff, for which the consideration was the above sum of 11*l.*, and a further sum being a new debt: Held, in an action on the bill, that he could not plead his discharge under 7 Geo. 4, c. 57, as an answer to the whole bill, though he might as to part relating to the old debt. (1 C. M. & R. 85; 5 D. P. C. 13; 1 C. & M. 30; 5 M. & W. 509.)—*Sherman* v. *Thompson*, 3 P. & D. 656.

INTEREST.

(*When recoverable under contract.*) By an agreement of the 10th of June, 1825, between the plaintiff and the defendants, the former agreed to sell, and the latter to purchase, certain iron works and estates for 600,000*l.*, to be paid as follows: —a deposit of 25,000*l.*, 200,000*l.* on the 1st of October then next (on payment of which the defendants were to be let into possession), 100,000*l.* on the 15th of April, 1826, 100,000*l.* on the 15th of October, 1826, 100,000*l.* on the 15th of April, 1827, and 75,000*l.* on the 15th of October, 1827, "with interest for the same sums at the rate of five per cent. per annum, to be reckoned from the 1st October then next (1825) until the day of payment thereof, such interest to be paid by equal half-yearly payments."

By a second agreement between the parties, of the 1st of October, 1825, certain alterations were made as to the time for the completing the title, and in some other respects; but it was (amongst other things) expressly provided that nothing therein should disturb or alter the payment of the three instalments of 100,000*l.* each (the 25,000*l.* and 200,000*l.* having been paid), or of the interest thereof, on or before the days or times appointed in that behalf in the first agreement, and also the interest of the said sum of 75,000*l.* down to the 15th of October, 1827, inclusive; but it was thereby agreed, that instead of the said instalment of 75,000*l.* being paid on the 15th of October, 1827, the said instalment of 75,000*l.* should be left upon the security of the said estates and property at interest, at the rate of four and a-half per cent. per annum, and to be then made by way of mortgage to the vendor, with a covenant to pay the same, as well principal as interest, and to continue to a period of fourteen years from the said 15th of October, 1827."

By a third agreement of the 4th November, 1825, the purchasers were relieved from all personal liabilities to the payment of the instalments, "except that they should be and remain answerable for and liable to the payment of the interest, and the remaining instalments of the said purchase-money, as in the first agreement expressed, so long as they remained in possession of the premises, or any part thereof;" and 50,000*l.* of the purchase-money was remitted.

In an action upon these agreements, the plaintiff in his declaration omitted the above proviso printed in the second agreement, and assigned for breach the non-payment by the defendants of 89,375*l*, the amount of eleven half yearly instalments, at the rate of five per cent. per annum upon 325,000*l.*, the balance of the purchase-money remaining unpaid; and also the non-payment of interest upon those several half-yearly payments from the several days and times at which according to the agreements they respectively became due. The defendants paid into Court 37,312*l.* 10*s.*, contending that upon the proper construction of the whole of the contracts, the interest upon the last instalment of 75,000*l.* was to be calculated at the rate of four and a-half per cent. from the 15th October, 1827,

and not at five per cent. The jury returned a verdict for the plaintiff, 2062*l.* 10*s.*, being the difference occasioned by the disputed half per cent. upon the 75,000*l.*

Held, first, that upon the proper construction of the whole of the three agreements, the plaintiff was entitled to interest upon the 325,000*l.* at five per cent., from the times at which the instalments were payable to the day on which he would in the ordinary course be entitled to sign final judgment,—the events contemplated by the second agreement, that would have entitled the defendants to be charged only with the reduced interest on the 75,000*l.* (viz. the payment of three instalments of 50,000*l.*, 100,000*l.*, and 100,000*l.*, and the execution of a mortgage and covenant) never having happened; secondly, that the plaintiff was not entitled to interest upon the half-yearly instalments, independently of the statute of 3 & 4 Will. 4, c. 42, s. 28, there being neither an express promise to pay interest on each sum which should become due for interest, nor a written contract to pay a sum certain for interest on such sums, so as to make the interest itself a debt due on a day certain; and the transaction not being a mercantile one, in which interest upon interest is usually allowed in the course of trade.

And it having been left to the jury, under the statute, to exercise their discretion in the matter, with very strong expressions of opinion on the part of the judge, and they having declined to allow such interest, the Court refused to interfere.

Quære, whether upon the record as framed, the payment into Court admitting the contract, it was competent for the defendants to set up the proviso in the second agreement, which the declaration omitted to notice, in order to qualify the amount of damages?—*Attwood* v. *Taylor*, 1 Scott N. R. 611; 1 M. & G. 279.

INTERPLEADER ACT.

1. (*Costs.*) On an issue under the 1st section of the Interpleader Act, the plaintiff claimed 183*l.* for work and labour, and recovered only 50*l.* A judge at chambers having made an order that each party should pay his own costs of the cause and issue, and of all applications and proceedings in the cause and issue, the Court declined to interfere. (3 M. & Scott, 174.)—*Kerr* v. *Edwards*, 8 Scott, 337.

2. The plaintiff sold the defendant a rick of hay belonging to a deceased person; afterwards a third party took out administration to the effects of the deceased, and claimed the price of the hay from the defendant: Held, that the defendant could not apply for relief under the 1st section of the Interpleader Act.—*James* v. *Pritchard*, 8 D. P. C. 890.

LANDLORD AND TENANT.

(*Forcible expulsion of tenant.*) Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession by expelling him.—*Newton* v. *Harland*, 1 Scott N. R. 474.

LAND-TAX.

(*Double assessment to.*) The stat. 1 & 2 Vict. s. 58, s. 2, which enables the Court of Exchequer, on application by the owner or occupier of lands, to call upon commissioners of land-tax to appear and maintain or relinquish their assessments, in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated twice

by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 23.—*In re Glatton Land-Tax*, 6 M. & W. 689.

And see TITHES.

LEASE.

1. (*Of mines—Evidence in actions by lessees against wrong-doer—Agreement inter alios—Stamp.*) The plaintiffs were lessees under certain persons, called the Lords of Mold, of all mines and minerals under a large tract of waste land, called Mold Mountain. In trover for ore wrongfully extracted from a spot which the plaintiffs alleged to be part of Mold Mountain: Held, that it was not necessary for the plaintiffs to prove the title or seisin of their lessors; but that it was enough for them, as against the defendants, who were wrong-doers, to show a possession and enjoyment by themselves under the lease; and that, for this purpose, acts of ownership exercised by the plaintiffs, by working mines on other parts of the mountain, were evidence of their right under the spot in question, being part of the waste. The lease professed to demise the plaintiffs all mines and minerals "in, upon, or under all or any part of messuages or tenements, fields, closes, or parcels of land described and set forth in the map thereunto annexed; and also in, upon, or under all or any part of that large tract of land, called Mold Mountain; all which premises are situate, &c., are bounded, &c., and all which are particularly described, delineated, and distinguished in the map or plan thereof annexed to these presents," and which by agreement of all the said several parties thereto, was meant and intended to be taken as part of that indenture: Held, that the words of the demise were not to be controlled or restrained by the map, but might receive full effect, and be held to include a particular spot, the boundary of which could not be traced with strict accuracy upon the map, by reason of the smallness of the scale on which it was drawn.

A dispute arising as to the dividing line between the mines of the plaintiffs and defendants, their respective lessors agreed to refer the matter to a surveyor. The plaintiffs and defendants were no parties to this agreement; but it appeared that the latter had communication with the surveyor on the subject, were present when the boundary was staked out by him, and applied to plaintiffs' lessors for a lease of the disputed spot in the event of the referee's decision establishing the boundary against their landlord: Held, that this amounted to an acquiescence by them in the reference, so as to make the agreement admissible in evidence in an action against them.

By a memorandum dated the 14th of May, it was agreed between the parties, that a dispute as to the boundary between their respective estates should be referred to a surveyor residing at a distance from the spot; by a second memorandum, written on the same sheet of paper, and dated the 25th of May, the parties agreed to appoint one E. W. to set out the above boundary, and to abide by the line so to be set out by him; to the first of these memoranda a stamp was affixed just before the trial; the second was not stamped: Held, that the two constituted but one agreement, and therefore one stamp was sufficient.—*Taylor v. Parry*, 1 Scott N. R. 576.

2. (*Proviso for determining.*) An indenture of lease contained a clause that if the lessee should be desirous to put an end to the term at the end of the first fourteen years, and should leave or give six calendar months notice in writing, immediately preceding the end of the first fourteen years, then the demise should cease and determine.

The lease commenced at Michaelmas, and in November of the fourteenth year

of the term, the lessee gave notice in writing that he should deliver up the premises on the 24th June next, *agreeably to the covenants of the lease.* The jury found, that the lessor understood the notice to be to give up at the end of the fourteen years: Held that it was bad, as it varied from the proviso in the lease. (11 East, 312.)—*Cadby* v. *Martinez*, 3 P. & D. 386.

And see BANKRUPTCY, 3.

LIBEL.

(*Province of judge and jury in action for.*) It is competent to a judge, in an action for libel, to leave the question to the jury, without stating his opinion as to whether the publication amounts to a libel or not. (6 M. & W. 105.)—*Baylis* v. *Lawrence*, 3 P. & D. 526.

LIMITATION ACT.

(*Operation of 3 & 4 Will. 4, c. 27, s. 12—Right of entry, how far devisable.*) Section 12 of the 3 & 4 Will. 4, c. 27, has relation back as far as relates to the period of the act, and makes the possession of one coparcener, joint-tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. Therefore where one tenant in common has been out of possession for twenty years prior to the passing of that statute, he is barred by sections 2 and 12 from bringing his action, but may maintain it under section 15 within five years of the passing of the act, if the other tenant in common has not been in possession adversely to him at the time of the passing of the act.

Semble, a right of entry is not devisable without the aid of 7 Will. 4 and 1 Vict. c. 26.

In 1779, A. and B. being tenants in common, B. sold his interest; the purchaser then entered into possession of the whole of the premises, and he, his heir, and the defendant, the devisee of his heir, successively continued in possession of the whole from 1779 to 1836, when the ejectment was brought. D. T., through whom the lessor of the plaintiff claimed, was heir to A.: Held, that neither at common law, nor by virtue of the 3 & 4 Will. 4, c. 27, had there been any disseisin of D. T., and that therefore his interest was not a mere right of entry, but was devisable by his will made in 1835.—*Culley* v. *Doe* d. *Taylerson*, 3 P. & D. 539.

LIMITATIONS, STATUTE OF.

(*Pleading.*) A plea of the Statute of Limitations, concluding to the country, is good on special demurrer, since it contains no affirmative matter. (1 Show. 338; Com. Dig. Pleader (E), 33; 1 M. & W. 533.)—*Bodenham* v. *Hill*, 8 D. P. C. 862.

LUNATIC.

(*Costs of removal of insane pauper.*) An order of two justices for the repayment of the costs of removal and maintenance of an insane pauper, under 9 Geo. 4, c. 40, s. 42, can only be made by those justices who have made inquiry into and ascertained the last legal settlement of such pauper.

Where therefore an order recited that A. C., a lunatic, was removed to the lunatic asylum under an order of two justices, whose legal settlement, after due inquiry made and satisfactory evidence obtained, is at D., and adjudicated her settlement to be at D., and ordered the costs of maintainance, &c. to be repaid: Held, that the order was bad, as the Court could not intend that the justices who

made the order had themselves taken the evidence, and inquired into the place of settlement: Held, also, per Pattison, J., that where a parish in which the pauper was not settled, had maintained and removed the pauper to the lunatic asylum, an order of repayment to this parish could not be made under section 42, the payment having been made in its own wrong, and the act providing only for repayment to the county treasurer.—*Reg.* v. *Inhabitants of Darton*, 3 P. & D. 483.

MALICIOUS PROSECUTION.

A declaration for maliciously indicting and procuring the plaintiff to be indicted, is sustained, although it appear that the defendant preferred the indictment unwillingly, and solely because he was bound over to do so, if it appear that he was himself the cause of his being so bound over, by originally making a malicious charge before the magistrate.—*Dubois* v. *Keats*, 3 P. & D. 306.

MANDAMUS.

1. (*Practice in.*) The Court may quash part of a return to a mandamus on concilium as well as on motion, and allow the prosecutor to traverse part of the return after the judgment on concilium.—*Reg.* v. *North Midland Railway Company*, 3 P. & D. 622.

2. (*Same.*) Quære, to what extent a traverse of a return to a mandamus will be allowed after it has been held good on concilium. At all events, the rule as to allowing a traverse after a concilium has no application where the Court has simply refused, on motion, to order a return to be taken off the file.—*Reg.* v. *Payn*, 3 P. & D. 623.

3. In order to induce the Court to issue a mandamus to a canal company to make compensation to a claimant, a clear refusal on the part of the company must be shewn; mere delay in attending to the claim is not sufficient. (3 Ad. & E. 222.) —*Reg.* v. *Wilts and Berks Canal Company*, 8 D. P. C. 623.

MASTER AND SERVANT.

Where the declaration stated a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c. he might have acquired from being continued in the service: Held, that the plaintiff was only entitled to recover as damages wages for one month, and that the arrears of salary due to him at the time of dismissal, could only be recovered in indebitatus assumpsit for work and labour.—*Hartley* v. *Harman*, 3 P. & D. 567.

MINE. See LEASE, 1; POOR RATE, 1.

MONEY HAD AND RECEIVED.

(*Breach of duty by stakeholder.*) The defendant's son agreed to communicate to the plaintiff a secret for a dye, and the plaintiff agreed to pay him 25*l.* if a colour should be produced to the satisfaction of B., and the plaintiff handed over to the defendant a cheque for 25*l.*, to be paid to his son in that case, but if the colour was not good the money was to be returned. On the 2nd September an experiment was commenced as to the dye, and on the 3rd, before it was concluded, the defendant got the cheque cashed; on the 4th the experiment was finished, and the dye turned out a failure, and was disapproved of by B. The plaintiff demanded the money of the defendant, but without mentioning the decision of B.: Held,

that the plaintiff was rightly nonsuited, as he had no cause of action till the decision of B. had been communicated to the defendant.

Held also, that as the cheque had been treated throughout as money, the defendant had not committed any breach of duty by getting it cashed, so as to make him liable for money had and received.—*Wilkinson* v. *Godefroy*, 3 P. & D. 411.

MORTGAGE.

(*Staying proceedings in debt on bond securing mortgage money.*) On application under 7 Geo. 2, c. 20, s. 1, to stay proceedings in an action on a bond securing the principal and interest payable on a mortgage, if the mortgagee seeks to obtain interest for the interval between granting the rule and actual payment of the principal into his hands, he must make his claim to it, at the time of discussing the rule, for he cannot afterwards sustain it.—*Jordan* v. *Chowns*, 8 D. P. C. 709.

MORTMAIN ACT.

The 9 Geo. 2, c. 36, s. 1, prohibits the conveyance of any lands, tenements, or hereditaments in trust, " or for the benefit of any charitable uses whatsoever," unless amongst other things " the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation," &c.: Held, that the declaration of uses need not be contained in the grant itself; a reference to the uses declared in another grant will suffice.—*Doe* d. *Williams* v. *Lloyd*, 1 Scott N. R. 505.

MUNICIPAL CORPORATION ACT.

1. A bond given in 1833 by a corporation to one of its members, to reimburse him the costs which he had, without the authority of the corporation, incurred in defending himself and several other members, though unsuccessfully, against quo warranto informations, is a lawful debt within 5 & 6 Will. 4, c. 76, s. 92.—*Holdworth* v. *Mayor of Clifton Dartmouth Hardness*, 3 P. & D. 308.

2. (*Election of mayor.*) The election of mayor on the 9th November in each year must be the first business done by the town council, and an election of aldermen on that day, previous to the election of mayor, is void.—*Reg.* v. *M'Gowan*, 3 P. & D. 557.

3. (*Same.*) An outgoing alderman may be elected mayor, but as outgoing alderman he has no original vote in the election of alderman.—*Reg.* v. *Stanley*, 3 P. & D. 561.

4. (*Same.*) Outgoing aldermen on the 9th November in each year may vote for the mayor to be elected on that day.—*Reg.* v. *Maddy*, 3 P. & D. 563.

5. (*Levying of borough rates on parts of townships.*) The defendant, the mayor of a borough, acting under the 92nd section of the 5 & 6 Will. 4, c. 76, issued a warrant against the plaintiff, as overseer of a township, part of which was within and part without the borough, to levy the proportion of a borough rate for that part of the township which was within the borough. In trespass against the mayor for a seizure of the plaintiff's goods under this warrant: Held, that the mayor had no jurisdiction to issue such warrant, and that trespass was the proper remedy.—*Fernley* v. *Worthington*, 1 Scott N. R. 432.

6. (*Jurisdiction of magistrates under 5 & 6 Will. 4, c. 76, ss. 60, 65.*) The 60th section of the 5 & 6 Will. 4, c. 76, authorizes justices of the peace, upon complaint made on the behalf of the council of any corporation, summarily to convict any officer appointed by such council who shall refuse or wilfully neglect to pay over money or to account in manner therein provided, or to deliver up books,

papers, and writings in his custody or power relating to the execution of the act, or to give satisfaction to the council respecting the same; and for default of sufficient distress, or in case of refusal or wilful neglect to deliver up such books, &c. empowers them to commit the offender to gaol, there to remain until he shall pay, account, or deliver up the books, &c. or have given satisfaction in respect thereof to the council. The 65th section gives power to the council to remove from office every ministerial or executive officer of the borough who shall be in office at the time of the first election of councillors under the act; and then enacts, that every officer who shall be in possession of any "monies, goods, valuable securities, books and papers, belonging to or concerning the body corporate whose officer he is," shall deliver them up when required in the manner therein pointed out, and provides "that the council shall have the same remedy to recover the same as is therein-before provided in the case of officers appointed by such council." The plaintiff had held the office of crier, under the old corporation of Evesham. The new council having removed him from his office, he was duly served with a notice to deliver up to J. T., the town-clerk, the bell which had been lately used by him in his office of crier; and upon his refusing to comply with the notice, he was summoned before three justices, convicted of the offence of such refusal, and adjudged to be committed to gaol, there to remain until he should deliver up the said bell, or give satisfaction in respect thereof to the said council, or to the said J. T.: upon this adjudication a warrant was afterwards made out, under which the plaintiff was committed to prison: Held, that under the sections above referred to, the magistrate had jurisdiction to convict the plaintiff, and, there being nothing upon the face of the conviction to make it void, neither they nor the officer who executed the warrant could be treated as trespassers.—*Baylis* v. *Strickland*, 1 Scott N. R. 540.

7. (*Power of town council over fees in Court of Requests.*) By a local act of Parliament, 56 Geo. 3, a Court of Requests was created at Bristol, and certain fees, according to a table therein contained, were fixed to be paid to the assessor and officers of the Court, with power for the justices of the peace for the said city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 Will. 4, c. 105, s. 8, it is enacted, "that every thing provided in any local act of parliament to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some court of general or quarter sessions assembled, *and which does not relate to the business of a court of criminal or civil judicature*, shall and may be done by the council at some quarterly meeting of the council." The town council of Bristol, acting under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 124, and 6 & 7 Will. 4, c. 105, s. 8, by an order of council, reduced the fees payable to the assessor and clerk of the Court: Held, that the regulation of the fees of the Court of Requests was a matter relating to the *business of a court of civil judicature*, and that the town council had no authority to interfere with it.—*Palmer* v. *Powell*, 6 M. & W. 627.

8. (*Compensation.*) Under the 5 & 6 Will. 4, c. 76, s. 66, the lords of the treasury have no jurisdiction to inquire or decide whether the officer of a borough has been properly removed from office on the ground of misconduct. And therefore, where the town council had refused compensation, and the lords, on appeal under s. 66, and on inquiry into the facts on which the removal took place, confirmed such refusal, the Court of Queen's Bench, on affidavits satisfactory to them, granted a mandamus, calling on the corporation to assess a compensation, notwithstanding

the judgment of the Treasury.—*Reg.* v. *Corporation of Warwick*, 10 Ad. & E. 386; 3 P. & D. 477.

NEW TRIAL.

1. The plaintiff declared in covenant, reciting that P. had demised a house to the defendant, and the defendant had by the lease covenanted to repair: that the defendant had assigned to the plaintiff, with covenant that the defendant had repaired according to the terms of the lease: breach, non-performance, alleging as aggravation, that the plaintiff had assigned to C. with a covenant that the covenants in the lease had been performed; that C. had sued the plaintiff for their non-performance, whereby the plaintiff had to pay C. 120*l.* to settle the action, besides 119*l.* the expenses of defending it. Plea, payment into Court of 5*l.* and no damages ultra: replication, damages ultra. Verdict for 45*l.* beyond the 5*l.*—On motion by the defendant for a new trial, on the ground that the plaintiff was not liable to C. except for his own acts, and therefore could not charge the defendant with 120*l.* or 119*l.*, the Court refused a rule, the verdict being general, and not showing that the jury had given damages in respect of C.'s action, and it being the defendant's duty to point out the limitation contended for, at the trial.

   The Court refused also to increase the damages by the 119*l.*, since the damages recovered by C. exceeded the sum given in this action, and must therefore have been in part attributable to the plaintiff's own acts; so that the costs of the defendant against C. did not appear to be the necessary consequence of the defendant's breach of covenant.—*Short* v. *Kalloway*, 11 Ad. & E. 28.

2. On an application to set aside a verdict and have a new trial, on the ground of excessive damages, the Court will not receive the affidavits of the defendant's witnesses, either to explain or add to the evidence given by them at the trial.—*Phillips* v. *Hatfield*, 8 D. P. C. 882.

ORDER OF JUSTICES.

(*Certiorari—Notice to justices.*) Under the stat. 13 Geo. 2, c. 18, s. 5, notice to justices of an application for a certiorari to bring up their order, should state that the notice is given by the party suing out the certiorari, and should specify the party: and upon such application, the party suing out the writ should be identified by affidavit with the prosecutor named in the notice, and the justices therein named with those on whom notice has been served. And the objection to the notice is not cured by the rule nisi being enlarged by consent. (4 B. & Ald. 289.)—*Reg.* v. *How*, 11 Ad. & E. 159.

And see QUO WARRANTO, 1.

ORDER OF REMOVAL.

1. (*Power to supersede order after appeal.*) After an appeal has been entered against an order of removal, and notice of trial given, the justices who made the order have no power to supersede the order on the application of the respondents; and where the Quarter Sessions refused to hear an appeal, on the ground that such order has been superseded, the Court of Q. B. issued a mandamus to hear the appeal on the merits.—*Reg.* v. *Justices of Middlesex*, 3 P. & D. 459.

2. (*Jurisdiction of sessions—Statement of grounds of removal.*) It is a matter of discretion for the Quarter Sessions whether a variance between the evidence given at the trial of an appeal, and the grounds of removal stated in the copy of the examination sent to the appellants, is fatal or not. (8 Ad. & E. 423.)—*Reg.* v. *Justices of West Riding of Yorkshire*, 3 P. & D. 462.

3. (*Grounds of appeal—Examination.*) The examination on which an order of removal was made, stated that the pauper's father gained a settlement in M. by renting and occupying a house of one I. F. in M. of the yearly rent of 10*l.*: the grounds of appeal stated the order, examination, and notice of chargeability, were bad on the faces thereof: Held, that the appellants might show, under their grounds of appeal, that the examination was defective, in not stating how long or when the renting was. A statement that a settlement was gained by renting a tenement in the respondent parish in the years 1816, 1817, 1818, 1819, some or one of them, is an insufficient ground of appeal.—*Reg.* v. *Inhabitants of Middleton in Teesdale*, 3 P. & D. 473.

4. (*Who may appeal against.*) Rate payers of a parish have no power to appeal against an order of removal, independently of the parish officers. *Semble*, per Littledale, J., that the pauper may appeal. (1 B. & Adol. 616; Carth. 222.) —*Reg.* v. *Colbeck*, 3 P. & D. 488.

5. (*Appeal—Mandamus.*) Where the Quarter Sessions refused to hear an appeal against an order of removal, on the ground that the appellant parish had not two legal overseers, because one of them claims the exemption from serving the office, but which exemption has not been allowed, the Court compelled the sessions by mandamus to hear the appeal.—*Reg.* v. *Justices of Cheshire*, 8 D. P. C. 616.

6. (*Appeal, when in time.*) An order of removal was served on the 18th of March. The next sessions were held on the 8th of April. By the practice of the sessions, seven days notice of appeal was required: Held, that since the stat. 4 & 5 Will. 4, c. 76, s. 79, the Midsummer sessions following were the next practicable sessions for the purpose of appealing. (4 Ad. & E. 319; 4 D. P. C. 633; 6 Ad. & E. 894.)—*Reg.* v. *Justices of Hertfordshire*, 8 D. P. C. 638.

OUTLAWRY.

(*Reversal of, on what terms.*) Since the stat. 1 & 2 Vict. c. 110, the Court will reverse an outlawry on payment of costs and on entering a common appearance, unless it be shown that the defendant is out of or about to leave the country; in which case it seems the Court will require special bail. (7 D. P. C. 725.)—*Bank of England* v. *Reid*, 8 D. P. C. 848.

And see AMENDMENT, 3.

OVERSEERS. See POOR RATE, 2.

PARTICULARS.

In an action for a breach of warranty of a horse, the Court will not compel the plaintiff to give particulars of unsoundness.—*Pylie* v. *Stephen*, 8 D. P. C. 771.

PARTNERSHIP. See STAMP, 4.

PAUPER.

A party may be admitted to sue in formâ pauperis after the commencement of the suit, but in that case he will be liable to pay costs up to the time of his admission so to sue. (Andr. 306; 3 Wils. 24; M'Clel. & Y. 282; 4 M. & W. 610; 7 D. P. C. 543.)—*Casey* v. *Tomlin*, 8 D. P. C. 892.

PLEADING.

1. (*Right of way—New assignment.*) Trespass quare clausum fregit, with abuttals. Plea, a right of way. New assignment, trespass extra viam; plea, that before &c., the plaintiff had wrongfully stopped up the way in the former plea men-

tioned, wherefore the defendant did necessarily go a little out of the said high way, quæ est eadem. Replication, de injuriâ. At the trial it appeared that there was a public footway over the plaintiff's close, which the plaintiff admitted, and another footway which the defendant claimed as public, but which the plaintiff had stopped up, and it was proposed to try the question as to the existence of a public right over this second way. The learned judge being of opinion that no issue was raised as to the second way, directed a verdict for the plaintiff: Held, that the direction was right, for the precise locality being material to the defence, the defendant was bound to show it in his pleadings.—*Ellison* v. *Iles*, 3 P. & D. 391.

2. (*Son assault demesne.*) In a plea of son assault demesne, the allegation "before the said time when, &c.," sufficiently confesses the assault in the declaration.—*Wise* v. *Hodsoll*, 3 P. & D. 510.

3. (*Infancy—Operation of* 9 *Geo.* 4, *c.* 14.) Where the defendant pleads infancy and the replication avers a ratification by promise in writing when the defendant was of age, the plaintiff has merely to prove the promise, and not that the defendant was of age when he made it; it lies upon the defendant to prove that he was then under age.

A written promise to pay a debt contracted during infancy, is sufficient under 9 Geo. 4, c. 14, although it neither contains the name of the creditor, the amount due, nor the date, and parol evidence is admissible to supply those particulars. (1 C. & M. 623; 3 Bing. N. C. 883.)—*Hartley* v. *Wharton*, 3 P. & D. 533.

4. (*Several counts—Certificate under Reg. Gen. H.* 4 *W.* 4, *s.* 7.) The whole of the rule 7 of Hilary Term 4 Will. 4, is to be read together; and the judge cannot certify, under the concluding part of the rule, to deprive a party of the costs upon the issue on which he has succeeded, on the ground that a distinct matter of complaint or defence was not intended to be established under several counts or pleas, unless in cases in which the early part of the rule applies, viz. where the party has failed at the trial to establish such distinct matter.

Where, therefore, at the trial the plaintiff succeeds upon an issue in fact as to one count, and assesses contingent damages on another count, as to which there is a demurrer pending, as there has been no failure to establish any thing on the latter count, the judge cannot certify.—*Head* v. *Baldrey*, 3 P. & D. 625.

5. (*Condition precedent, what amounts to—Repugnancy and inconsistency.*) By an agreement between the plaintiffs and defendants, reciting that the plaintiffs had advertised for sale by public auction certain collieries and other property, under a power contained in certain mortgage securities, in which collieries and other property the defendants were or claimed to be incumbrancers, and that the plaintiffs had, upon the request of the defendants, and for the considerations thereinafter mentioned, agreed to postpone the sale—it was stipulated (amongst other things), that the amount found due to the plaintiffs on taking an account as therein mentioned, should be secured to be paid to the plaintiffs by the deed of covenant of the defendants, by three instalments, the first to be payable at four months from the date of the agreement; that the possession of the collieries, debts, and stock should be given up to the defendants; that on payment of the first instalment, the whole of the property comprised in the mortgage securities held by the plaintiffs (except the collieries), should be released and conveyed to the defendants; and that the deed of covenant should be forthwith prepared, and

executed by all parties within twenty-one days from the date of the agreement. In assumpsit against the defendants for not executing the deed of covenant, the declaration alleged, that the plaintiffs were interested in the collieries and other property in the agreement mentioned, as mortgagees thereof under and by virtue of certain mortgage securities, and were in possession of the said collieries, and were possessed of certain large quantities of coal, and certain debts were then owing to them for the price of coal the produce of the collieries, in which collieries and other property two of the defendants were or claimed to be interested as incumbrancers; and that the plaintiffs had advertised for sale, and were about to sell by public auction, their interest in the said collieries and other property in the agreement mentioned, under a power lawfully authorising them in that behalf, and contained in the said mortgage securities; of all which the defendants had notice: and after setting out the agreement, assigned for breach the non-execution by the defendants of the deed of covenant: Held, on special demurrer, that the production of a title to convey was not a condition precedent to the plaintiffs' right to sue the defendants for not executing the deed of covenant, the parties not standing in the relation of vendors and purchasers.

Held, also, that there was no repugnancy or inconsistency in the allegation that the plaintiffs were about to sell their interest in the collieries and other property, under a power lawfully authorizing them in that behalf—the term "power" being to be construed in its popular and not in its artificial sense.

Held, also, that the allegation of interest in the plaintiffs was sufficiently certain.—*Hallewell* v. *Morrell*, 1 Scott, N. R. 309.

6. (*New Assignment.*) In trover by assignees for 400 bales of cotton, the defendant pleaded, as to the converting 304 bales, parcel of the cottons in the declaration mentioned, that they were purchased by one T. B. M. as agent for the bankrupts, and paid for by him, and shipped for and on account of the bankrupts, and that, they becoming insolvent, and the cottons coming to the hands of the defendant as owner of the vessel on board of which they were shipped, T. B. M., the consignor, stopped them in transitu. To this plea the plaintiffs new assigned that they issued their writ, and declared thereupon, not for the supposed conversion in that plea mentioned, but for that the defendant converted and disposed to his own use divers bales of cotton, "different to and other than the said bales of cotton in the introductory part of that plea mentioned;" and also for that the defendant converted and disposed of the last mentioned bales of cotton "on other and different occasions and times, and for other and different purposes, and in another and different manner than in the said plea mentioned." Plea, not guilty:—Held, that however objectionable in point of form, the new assignment in substance alleged another and different conversion of the same subject-matter as that mentioned in the plea: and a verdict having been passed for the defendant on the trial, upon the assumption that the plaintiffs were bound to prove a conversion of cottons other than the 304 bales mentioned in the plea to the declaration—the Court directed a new trial.

A new assignment does not admit the facts alleged in the plea: it merely amounts to an assertion that the matter which the plea seeks to justify, is not that in respect of which the plaintiff is suing.—*Brancker* v. *Molyneux*, 1 Scott, N. R. 553.

7. (*Denial by lessor of his reversion—Departure.*) Declaration in covenant by A. the surviving lessor in a lease for years, granted by A., B., and C., to the de-

fendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. Plea, that A., B., and C., from the time of making the demise until the death of B., and A. and C. afterwards, had a reversion for a longer term of years, expectant on the lease, and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A., B. and C. were not until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the demised premises, in manner and form as alleged in the plea: Held bad, on demurrer, as being a departure from the declaration. (1 B. & B. 531.)—*Green* v. *James*, 6 M. & W. 656.

8. (*In debt—Admission of debt on record—Account stated—Evidence.*) Debt for goods sold and delivered and on an account stated. The particulars claimed 9*l.* 17*s.* 6*d.* The defendant pleaded, as to all except two sums of 1*l.* 0*s.* 6*d.* and 8*l.* 17*s.*, nunquam indebitatus; as to 1*l.* 0*s.* 6*d.*, payment into Court; and as to 8*l.* 17*s.* a set-off. Issue on the first and third pleas; the plaintiff took out of Court the money paid in under the second. Semble, that upon this record the plaintiff had nothing to prove, and that the only issue was on the defendant.

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods.—*Newhall* v. *Holt*, 6 M. & W. 662.

9. (*Profert.*) The plaintiff alleged as an excuse for not making profert of a deed, that it was "in the possession of certain persons, to wit, J. B. H. and T. H., who before and at the time of the commencement of the suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant:"—Held, that this was not a sufficient excuse for the want of profert, as it did not allege that the party who had possession of the deed had refused to produce it. (10 Rep. 92 a; 4 M. & W. 538.) —*Hill* v. *Marsden*, 6 M. & W. 718; 8 D. P. C. 756.

10. (*Profert.*) In pleading a conveyance by lease and release, profert must be made of the *release*. (Litt. s. 452; 1 Saund. 9 b; 10 Rep. 92 a; 3 T. R. 151; 8 T. R. 571; 2 H. Bl. 259; Cro. Car. 441.)—*Jenkin* v. *Peace*, 6 M. & W. 722; 8 D. P. C. 758.

11. (*Issuable plea, what is.*) A plea to an action by the holder of a cheque, that the consideration for the making of it was money won by a third party of the defendant at hazard, in a common gaming-house, is not an issuable plea, within the meaning of an order to plead issuably. (5 D. & R. 620; Tidd Pr. 471.) —*Humphreys* v. *Earl of Waldegrave*, 6 M. & W. 622; 8 D. P. C. 768.

12. (*Set-off.*) Where the plaintiff replied to a plea of set-off "that he was not nor is indebted to the defendant in manner and form," &c.: Held, that he was not at liberty to give evidence of payment, in answer to the proof in support of the set-off. (4 D. P. C. 585.)—*Jackson* v. *Robinson*, 8 D. P. C. 622.

13. (*Dating Similiter.*) A similiter added by a party for himself need not have a date: it is not a pleading within the rule of H. T. 4 Will. 4. (6 D. P. C. 562; 8 D. P. C. 170.)—*Eddin* v. *Ward*, 8 D. P. C. 725.

14. (*Duplicity—When plea amounts to general issue.*) Declaration in case against a sheriff alleged the recovery of a judgment against W., and the issuing of a writ of testatum fi. fa. directed to the defendant, by virtue whereof he seized the

goods of W., and remained in possession thereof for a long time. Breach, that the defendant wrongfully forbore to sell from the 30th April until the 17th May, when he returned that he had taken, &c. the goods of W. and falsely returned that the goods remained in his hands for want of buyers. Pleas, 1, that the defendant did not seize or take in execution any goods of W., or remain in possession under the writ for the time in the declaration mentioned: 2. that the defendant could not, during the time in the declaration mentioned, have sold the goods: 3. a fiat in bankruptcy against W., by which the goods vested in the official assignee.—Held, that the first plea was bad, for duplicity; the second, as amounting to the general issue; and the third, as being an argumentative denial that the goods seized were the goods of W.—*Rowe* v. *Ames*, 8 D. P. C. 750.

15. (*In action on bill—Plea of non assumpsit.*) Where, to an action on a bill of exchange, together with the money counts, the defendant pleads non assumpsit to the whole declaration, the plaintiff should sign judgment as to the count on the bill and enter a nolle prosequi as to the other counts, but he cannot set aside the plea as frivolous.—*Fraser* v. *Newton*, 8 D. P. C. 773.

16. (*Accord and satisfaction to one of several creditors.*) A plea of an accord and satisfaction to one of several joint creditors is a good bar to an action at the suit of all, and the plea need not show that the other creditors were parties to the accord. (6 Rep. 252; 9 B. & C. 532.)—*Wallace* v. *Kelsall*, 8 D. P. C. 841.

17. (*Several pleas.*) In an action by indorsee against maker of a promissory note, the Court refused to allow the defendant to plead "that the note was obtained by fraud, and that the plaintiff took it with knowledge of the fraud," together with a plea showing "fraud and want of consideration for the making of the note, and that the plaintiff was a party to such fraud, and that the indorsement was without consideration." Nor would they allow a plea "that the note was given to the payee to indemnify him against loss on the re-sale of an estate, that no loss had arisen, and that there was no consideration for the indorsement," together with a plea "that the note was given to the payee for a special purpose, and indorsed to the plaintiff in fraud of the defendant, and without consideration."—*Beavan* v. *Tanner*, 8 D. P. C. 870.

18. (*Several counts.*) A count in detinue for a bill or note is allowable together with a count in debt for the amount of the bill or note.—*Kirkpatrick* v. *Bank of England*, 8 D. P. C. 881.

19. (*Replication de injuriâ—Plea, when amounting to general issue.*) Indebitatus assumpsit for work and services in navigating barges. Plea, that the sum claimed was wages for work done by the plaintiff, as master of a boat used by the defendants for the carriage of goods, they being common carriers; that it was agreed that the plaintiff, as master, should be chargeable for all pilferings, losses, &c. to goods under his charge, and that the amount should be deducted from his wages, and might be pleaded as a set-off. The plea then alleged the pilferage of a pipe of wine while under the plaintiff's charge, and claimed to set off the damage in consequence thereof against the plaintiff's demand. Replication, de injuriâ, held bad. And per Lord Abinger, C. B. the plea also was bad, as amounting to the general issue.—*Cleworth* v. *Pickford*, 8 D. P. C. 873.

And see BANKRUPTCY; LIMITATIONS, STATUTE OF; RAILWAY ACT, 2.

POOR LAW AMENDMENT ACT.

(*Power of commissioners to appoint officers.*) The poor law commissioners, or the returning officer appointed by them, cannot themselves appoint *paid* officers for

executing the purposes of the act, although for a temporary purpose only. Semble, that the commissioners have power to rescind and alter their orders for regulating the conduct of elections of guardians from time to time as they think fit.—*Reg.* v. *Hunt*, 3 P. & D. 476.

POOR RATE.

1. (*Rateability of toll tin—Occupation of mines.*) The appellant against a poor rate, being lessee for ninety-nine years of all the toll and farm of tin, which should arise in certain places then under bounds, according to the custom of the stannaries, granted to T. for twenty-one years, full liberty to enter upon a part of the land of which the appellant was lessee, and to open the ground, and to drive adits and sink shafts, and to erect buildings, to dig for tin, and at T.'s pleasure to take away the same, reserving nevertheless to the appellant liberty from time to time to enter and inspect the workings of the mine, and to take up any adits for the purpose of working any adjoining mine, S. yielding to the appellant during the term 1*s.* in the pound for every parcel of tin ore; T., to whom the mine had been previously under bounds, was not rated for it, but continued to work the mine, and after the demise paid the appellant the 1*s.* reserved: Held, that the appellant was not an occupier, and therefore not rateable in respect of the toll of tin.

   The lessee of toll tin is rateable as an occupier.—*Reg.* v. *Crease*, 3 P. & D. 434.

2. (*Appointment of separate overseers.*) The parish of T. contained one hamlet in the county of Warwick, which had always maintained its own poor separately, with separate overseers and surveyors of highways; and three hamlets in the county of Worcester, which had each its own overseer, surveyor of highways, and constable, but they maintained their poor jointly. There were two churchwardens for the whole parish, and the parish church was common to and repaired by all four hamlets. After the passing of the 4 & 5 Will. 4, c. 76, the hamlets in Warwickshire and the three hamlets in Worcestershire were, with other parishes, annexed to a union, and a certain annual quota was assessed on the three latter hamlets jointly. One of these hamlets applied to the Court for a mandamus to appoint separate overseers under 13 & 14 Car. 2, c. 12: Held, that the Warwickshire hamlet could not be considered a reputed parish under 43 Eliz., and that each of the other hamlets was entitled to have separate overseers under 13 & 14 Car. 2, although the policy of that statute, as to the relief of the poor in small districts, was at variance with the 4 & 5 Will. 4, c. 76.—*Reg.* v. *Justices of Worcestershire*, 3 P. & D. 465.

3. (*Allowance of.*) Semble, the allowance of a poor rate by justices is still a mere ministerial act, notwithstanding 6 & 7 Will. 4, c. 96, s. 1, which says, that no rate shall be allowed which is not made upon the net annual value of the property rated: Held, that at all events they cannot refuse to allow a rate, on the sole ground that it is not in conformity with the valuation made by order of the poor law commissioners under sect. 3.—*Reg.* v. *Earl of Yarborough*, 3 P. & D. 491.

4. (*Appeal, time for.*) A poor rate was published on the 14th October, and the next sessions took place on the 23rd. Nothing was done at those sessions by the appellant, but at the January sessions an appeal was entered and respited. Notice of appeal was given for the following Easter sessions, when the justices refused to hear the appeal. The Court granted a mandamus to compel them to hear it. (3 East, 342; 8 B. & C. 639, 640.)—*Reg.* v. *Justices of Suffolk*, 8 D. P. C. 618.

PRACTICE.

1. (*Staying proceedings—Authority of master—Costs.*) An order cannot be made for staying proceedings on payment of debt and costs, in an action for unliquidated damages; nor (per Erskine, J.) in an action to recover a sum due from a third person, with the costs of proceedings against him, the payment of which the defendant has guaranteed.

   Where the plaintiff, in one stage of an action for unliquidated damages, refuses to accept from the defendant, in satisfaction of the suit, a sum which he afterwards takes, he is not entitled to any costs subsequent to such refusal.

   Where, on the execution of a writ of inquiry, the parties agree to withdraw the case from the jury, and to submit it to the master under a judge's order, the master sits as an arbitrator, and his judgment on the facts is conclusive on the parties.—*Fisher* v. *Pyne*, 1 M. & G. 265.

2. (*Judgment as in case of nonsuit.*) The Court discharged a rule for judgment as in case of a nonsuit, where the excuse suggested was that the defendant had absconded after the commencement of the action, and was in a state of utter insolvency; the defendant declining to take a stet processus.—*Faulkner* v. *Whittall*, 1 Scott N. R. 216.

3. (*Time for pleading—Queen's birthday.*) The time for pleading expired on Monday, the 25th May; the Queen's birthday fell on the 24th, but was kept on the 25th; on which day all the offices were closed: Held, that a judgment signed on the opening of the office on the 26th was regular.—*Wilkinson* v. *Britton*, 1 Scott N. R. 348; 8 D. P. C. 815.

4. (*Same.*) On a motion for judgment in case of a nonsuit, it appeared that the plaintiff had become bankrupt, and obtained his certificate, and that the defendant was in prison penniless, and a petitioner to the Insolvent Debtors' Court; a stet processus was enforced.—*Gingell* v. *Bean*, 1 Scott N. R. 390.

5. (*Consolidation of actions.*) A suit being pending at the time of the passing of 6 & 7 Will. 4, c. 71, between the vicar and the land-owners, the questions involved in which were, whether the parish was divided by ascertained boundaries into uplands, townlands, and marshlands, with a modus payable in respect of each of 4*d.*, 6*d.*, and 8*d.* an acre respectively; an assistant commissioner, by his award made under the statute, found that there was payable in respect of the lands called marshlands a modus of 8*d.* an acre; and, as to the lands called uplands and townlands, that there was no certain or defined boundary, and consequently that the alleged moduses as to those were invalid. Both parties being dissatisfied with this award, actions were brought (for the purpose of trying issues under the 46th section of the statute) by the vicar against one of the land-owners, and by seventy-four land-owners against the vicar: The Court refused, at the instance of the vicar, to direct the proceedings in the seventy-four actions against him to abide the event of the issues to be directed in the action brought by him.—*Ward* v. *Pomfret*, 1 Scott N. R. 403.

6. (*Abandoning rule—costs.*) A rule to set aside a judge's order having been drawn up at the instance of the defendant without mentioning costs, the plaintiff consented to its being made; notwithstanding which the defendant obtained a second rule drawn up with costs, stating that he abandoned the first: The Court directed the costs to abide the event of the cause.—*Jeves* v. *Hay*, 1 Scott N. R. 399.

7. (*Time for entering rule to plead.*) There is no irregularity in entering a rule to

plead before service of declaration, but on the same day. (3 M. & W. 71.)—*Chapman* v. *Davis*, 1 Scott N. R. 431; 8 D. P. C. 831.

8. (*Altering entry of verdict on postea.*) The Court has no jurisdiction to alter the entry of a verdict on the postea, where the judge who presided at the trial declines, on summons, so to do.—*Newton* v. *Harland*, 1 Scott N. R. 503.

9. (*Judgment as in case of nonsuit, time for.*) Issue joined, in a country cause, in Michaelmas vacation, and no notice of trial given. A motion for judgment as in case of a nonsuit, in Trinity Term, is too soon; for the issue joined in vacation is referred to the subsequent term.—*Dore* v. *Hayden*, 6 M. & W. 626. (See the cases cited in the note.)

10. (*Service of rule.*) Service of a rule by giving it to the defendant's servant at his warehouse, that being his usual place of business, held insufficient.—*Ibotson* v. *Phelps*, 6 M. & W. 626; 8 D. P. C. 770.

11. (*Misnomer in writ, effect of.*) Where a defendant is described in the writ of summons by a wrong christian name, but in the declaration by his right one, the proceeding is regular, since the 3 & 4 Will. 4, c. 42, s. 11.—*Hobson* v. *Wadsworth*, 8 D. P. C. 601.

12. (*Renewal of motion.*) Where a rule has been discharged on the ground of defective materials to support it, the Court will not allow the application to be renewed on amended affidavits, although it is made by a prisoner, on a suggestion that the process on which he is detained is a nullity.—*Saunderson* v. *Westley*, 8 D. P. C. 652.

13. (*Form of issue.*) Where an issue states a defendant to have been arrested in 1839, on a capias issued in 1834, the Court will assume that the intermediate continuing process has been regular, unless the contrary be shown.

The form of issue given in the schedule to the rules of H. T. 4 Will. 4, may be varied according to the facts of the case, so as to set them forth truly.—*Harvey* v. *O'Meara*, 8 D. P. C. 676.

14. (*Short notice of trial.*) Where a defendant is under terms to accept short notice of trial for the first sittings in term, and the plaintiff, without any default on the defendant's part, is unable to reply, so as to give such notice, a short notice of trial for the second sittings is irregular. (3 M. & W. 431.)—*White* v. *Clarke*, 8 D. P. C. 731.

15. (*Staying proceedings on rule for costs of the day.*) On a rule for costs of the day for not proceeding to trial, the Court will not stay the proceedings until the costs are paid.—*Aime* v. *Chinnock*, 8 D. P. C. 736.

16. (*Judgment as in case of nonsuit.*) It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff has been informed and believes the defendant is in insolvent circumstances.—*Symes* v. *Amor*, 8 D. P. C. 773.

17. (*Judgment as in case of nonsuit.*) On motion for judgment as in case of a nonsuit, an affidavit stating that *after the declaration had been filed*, the plaintiff ascertained that the defendant was insolvent, and therefore instructed his attorney not to proceed to trial, is not sufficient to induce the Court to compel a stet processus. (8 D. P. C. 773.)—*Mann* v. *Williamson*, 8 D. P. C. 859.

18. (*Same.*) If the similiter have not been added in any one of the issues, although added in the others, the defendant cannot move for judgment as in case of a nonsuit.—*Wright* v. *Oldfield*, 8 D. P. C. 899.

19. (*Certificate for speedy execution.*) After final judgment signed, a judge can-

not rescind his certificate for speedy execution.—*Lander* v. *Gordon*, 8 D. P. C. 910.

20. (*Setting aside proceedings, time for.*) In moving to set aside proceedings for irregularity, if a previous application has been made at chambers within the time limited for such application, that fact should be stated on affidavit, and it is not sufficient that the judge to whom the application was made, being in Court, certifies the fact.—*Goren* v. *Tute*, 8 D. P. C. 868.

21. (*Entering appearance for defendant.*) Where a writ of summons was sent by post to the defendant, who retained it: the Court refused a rule calling on him to show cause why the plaintiff should not be at liberty to enter an appearance for him, without the indorsement of service required by the rule of M. T. 3 Will. 4, s. 3.—*Atkinson* v. *Howell*, 8 D. P. C. 872.

PRESCRIPTION ACT.

1. (*Artificial watercourse.*) The law of easements in respect of watercourses is generally, the same, whether they are natural or artificial. Where through an artificial channel made for the purpose of draining mines, the drainage-water has flowed for twenty years in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed (unless there is a custom to warrant it), so as to foul the water and disturb his enjoyment.

Quære, whether, in the absence of a custom, the practice of all mineral districts is material to show that the enjoyment of such water was not of right, as it must have been known that the mine-owner had made the watercourse for his own convenience, and had ceased to work it with the intention of resuming it whenever it suited his interest. (5 M. & W. 203; 1 Campb. 463; 6 East, 203; 5 B. & Adol. 1.)—*Magor* v. *Chadwick*, 3 P. & D. 367.

2. (*User of easement for twenty years—Interruption.*) Where an easement has been enjoyed for nineteen years and a fraction, and is then interrupted by the owner of the soil, the easement may still be acquired under 2 & 3 Will. 4, c. 71, at the end of the twentieth year, for the interruption to defeat twenty years' user must have been acquiesced or submitted to for a whole year.—*Flight* v. *Thomas* (in error), 3 P. & D. 442.

3. A plea of twenty years' enjoyment of a way under 2 & 3 Will. 4, c. 71, s. 2, must be supported by user for that period down to the commencement of the action.

Proof of user commencing forty years ago, but discontinued four or five years before the commencement of the action, is insufficient.—*Parker* v. *Mitchell*, 3 P. & D. 655.

PRISONER.

(*Discharge of small debtor.*) On an application to discharge a defendant out of custody under the 48 Geo. 3, c. 123, if the defendant is in custody of the marshal, the Court will take judicial notice of the handwriting of the clerk of the papers to the copy of causes.—*Alcock* v. *Whatmore*, 8 D. P. C. 615.

PRIVILEGES OF PARLIAMENT.

1. The House of Commons has power to commit for contempt and breach of the privileges of the House, under a warrant, stating generally that a contempt, &c. has been committed, without setting out the particulars of the contempt. Where, therefore, a committal under such warrant is returned to a habeas corpus, the courts of law cannot discharge the prisoner.

Quære, whether a prisoner so committed can be discharged by the courts of law, if the particulars of the alleged contempt are set out in the warrant, and are deemed insufficient.

Where a committal by the House of Commons, under such a warrant, is returned to a writ of habeas corpus, the 56 Geo. 3, c. 100, s. 3, does not apply so as to enable the courts of law to inquire into the existence of the contempt alleged.

To a writ of habeas corpus, the Serjeant-at-Arms of the House of Commons returned a committal under the following warrant: "Whereas the House of Commons has this day resolved that A. having been guilty of a contempt and breach of privilege of this House, be committed to the custody of the Serjeant-at-Arms attending this House, these are therefore to require you to take into custody the body of A., and him safely keep during the pleasure of this House, for which this shall be your sufficient warrant. C. S. L. Speaker:" **Held, that there was a sufficient adjudication that A. had been guilty of a contempt; and that it sufficiently appeared that the contempt committed had been against the House of Commons, and that the House had authorized the Speaker to issue the warrant.**—*Reg.* v. *Gossett*, 3 P. & D. 349.

2. The sheriff returned to a writ of venditioni exponas, that he had the money to be rendered to the plaintiff. A rule was then obtained, calling upon the sheriff to pay over the money. In answer to the rule, it was shown that the House of Commons had committed for contempt in levying the money, and had ordered him to refund it to the defendants, and that he had also been served with an order of the Insolvent Court, requiring him to pay over the money to the provisional assignee of the estate of the plaintiff, who was an insolvent. The Court made the rule absolute; and the sheriff not having complied with it, a second rule was made absolute against him for an attachment, although he was still in custody of the Serjeant-at-arms for the contempt of the House of Commons, under 3 Vict. c. 9, which passed after the above decision: Held, that on a certificate of the Speaker of the House of Commons, certifying that an action had been brought in respect of a publication made by the order of the House of Commons, it is imperative on the Court to stay proceedings.

Quære, whether cause can be shown against the rule to stay proceedings.—*Stockdale* v. *Hansard*, 3 P. & D. 330; 8 D. P. C. 669.

PROCESS.

1. (*Execution on rule of Court.*) Where, under an agreement of reference, a sum was awarded to be paid by the plaintiff to the defendant, and the agreement was afterwards made a rule of Court: Held, that the plaintiff could not, by virtue of the rule of Court, issue execution for the sum, under the stat. 1 & 2 Vict. c. 110, s. 18, that section being applicable only where the money payable by the rule is expressed in the rule itself.—*Jones* v. *Williams*, 11 Ad. & E. 175.

2. (*When goods are bound by delivery of fi. fa.*) Delivery of a fi. fa. to the sheriff's deputy in London is equivalent to delivery to the sheriff in the country. (5 M. & W. 432.) The goods of the debtor are bound, therefore, by such delivery to the deputy in London, and the execution cannot be defeated by a vesting order subsequently made by the Insolvent Court, under 1 & 2 Vict. c. 110, s. 37, although the provisional assignee seize before the sheriff, for such vesting order is not equivalent to sale in market overt, and passes such interest

only as the insolvent himself had in the goods, and subject to his liabilities. (3 M. & W. 622; 4 East, 523.)—*Woodland* v. *Fuller*, 3 P. & D. 570.

3. (*Setting aside writ—Indorsement on summons.*) Where the copy served of a writ is defective, the proper form of motion is, to set aside the service. (5 M. & W. 605.) An indorsement that "the plaintiff claims 50*l.* for debt, and —*l.* for costs" is irregular, and is a ground for setting aside the service.—*Truslove* v. *Whitechurch*, 1 Scott, N. R. 415; 8 D. P. C. 837.

4. (*Distringas.*) Where the summons was served at the defendant's counting-house, on a clerk, who said his master was abroad, and it was uncertain when he would return: the Court refused a distringas.—*Taylor* v. *Bush*, 8 D. P. C. 613.

5. (*Capias into county palatine.*) The stat. 7 & 8 Geo. 4, c. 71, s. 7, which prohibited the arrest of persons within the counties palatine, unless the debt amounted to 60*l.*, is in effect repealed by the 1 & 2 Vict. c. 110, s. 3; and a judge of the superior courts may now make an order for a capias to issue into a county palatine, if the debt amount to 20*l.*—*Brown* v. *M'Pherson*, 8 D. P. C. 852.

And see AMENDMENT, 1, 2; INSOLVENT, 2.

PROHIBITION.

(*Presumption in favour of right judgment of Ecclesiastical Court—Church-rate.*) A declaration in prohibition stated the plaintiff having been libelled in the Spiritual Court for non-payment of a church-rate, had pleaded in his defensive allegation, that the rate, though good on the face of it, was asked for and intended to be applied to the payment of antecedent debts, and that the Court had admitted to proof a responsive allegation, which alleged that the churchwardens of a prior year had necessarily incurred debts in consequence of the parish refusing to make a rate, and that the retrospective rate subsequently became necessary in order to discharge the said debts: Held, that whether the rate, being good in form, was or was not vitiated by any design to apply it retrospectively, and whether the rate, under the circumstances, was or was not bad, as being retrospective, the suit itself was matter of ecclesiastical cognizance, and the objection to the rate was such as the Ecclesiastical Court was able to give effect to, if valid, and that it was to be presumed that Court would correctly administer the law, and therefore the plaintiff was not entitled to prohibition.—*Griffin* v. *Ellis*, 3 P. & D. 398.

2. Upon an application for a writ of prohibition to the Ecclesiastical Court to prevent them from granting administration with the will annexed, in the case of a testamentary appointment by a married woman under a doubtful power, the Court ordered the party to declare in prohibition.—*In re Norman*, 1 Scott, N. R. 379.

QUEEN'S BENCH PRISON.

(*Liability of marshal in trespass.*) The marshal of the Queen's Bench prison is not liable for a tortious act committed by the deputy-marshal, in ill-treating a prisoner in the exercise of his office, unless the appointment of the deputy is proved, or the facts show that the marshal was cognizant of the act done.—*Yorke* v. *Chapman*, 3 P. & D. 496.

QUO WARRANTO.

1. (*Affidavit to ground application for.*) Under the rule of Mich. 3 Vict., the affidavit in support of a motion for a quo warranto information must state at

whose instance the application is made; it is not enough for a party to swear that if the information be granted, it is his intention to become really and bonâ fide the relator.—*Reg.* v. *Hedges*, 11 Ad. & E. 163.

2. Where a charter of incorporation had been granted, the Court discharged a rule for a quo warranto information at the instance of a private relator against a coroner appointed under the charter, on the ground that all the objections taken to his title applied equally to the charter itself, and that the charter itself could not be attacked through him. (10 B. & C. 230; 2 B. & Ald. 339.—*Reg.* v. *Taylor*, 3 P. & D. 653.

And see ORDER OF JUSTICES.

RAILWAY ACT.

1. (*Construction of—Competency of shareholders as witnesses.*) By the Hull and Selby Railway Act, 6 Will. 4, c. lxxx, s. 69, it is provided, "that where any part of any carriage, horse, or foot road, railway or tram road, quay, *wharf*, slope, or *other communication*, either public or private, shall be found necessary to be cut through, raised, sunk, taken, *or so much injured* as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., and for transporting, &c. of goods and merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low water-mark the defendants constructed their railway (in the line prescribed by the act of Parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous: Held, that the plaintiff's wharf was thereby *injured* within the meaning of this section (which was not confined to an injury done *bodily* to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future temporary or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act.

Under what circumstances proprietors of the railway, who had parted with their shares in order to become witnesses for the defendants, were competent, *quære.*—*Bell* v. *Hull and Selby Railway Company*, 6 M. & W. 699.

2. (*Construction of—Debt for calls—Pleading.*) By the Edinburgh and Leith Railway Act, 6 & 7 Will. 4, c. cxxi, s. 50, it is provided, that in actions by the company for calls, it shall be sufficient to allege, that the defendant, being a proprietor of so many shares, is indebted to the company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the company by virtue of this act, without setting out the special matter; and in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act. To a declaration in the general form given by this clause, the defendant pleaded pleas

denying notice of the calls pursuant to the act, and concluding with a verification: Held, that the allegation of notice, being a fact necessary to be proved in order to entitle the plaintiffs to recover, must be taken to be impliedly contained in the declaration, by reference to the act of Parliament; and therefore that the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the country and not with a verification, and were on that ground bad on special demurrer.

Semble, that in such case, the plea of not indebted would sufficiently put in issue all the matters required by the act to be proved in support of the action.

By another section of the act (s. 49), the directors were empowered to make the calls in manner therein mentioned, and to sue for them, in case of non-payment, by action of debt; or otherwise, in their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the company: provided that no advantage should be taken of any such forfeiture, until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the company within six months after such forfeiture should happen, which declaration should ipso jure be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded, that by reason of having neglected to pay calls on his shares, they were, in pursuance of the act, declared by the directors to be forfeited, and the directors exercised and declared their option, according to the act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture: Held, on special demurrer, that the plea was bad, for not showing that the shares were declared to be forfeited at a general or special meeting of the company, according to the provisions of the act.—*Edinburgh and Leith Railway Company* v. *Hebblewhite*, 6 M. & W. 707; 8 D. P. C. 802.

REPLEVIN.

(*Assignment of replevin bond.*) A replevin bond may be taken and assigned by *one* of the sheriffs of London in his own name only. *Thompson* v. *Farden*, 1 Scott, N. R. 275; 8 D. P. C. 813.

REWARD.

(*Action for reward promised by advertisement.*) The defendant sued for a reward, promised by advertisement, to any person who would give such information as would lead to the conviction of those concerned in a burglary in his (defendant's) house, pleaded that the plaintiff was policeman of the district where the house was, and therefore it was his duty to give information without reward: Held, on demurrer, that the information might have been supplied under such circumstances as that the plaintiff had done more than his ordinary duty required, and that therefore he was entitled to judgment.—*England* v. *Davison*, 3 P. & D. 594.

RULE OF COURT. See PROCESS, 1.

SCIRE FACIAS.

(*Staying proceedings in.*) The Court will stay proceedings in sci. fa. on a recognizance of bail, for the recovery of the amount of a verdict taken generally for claims, some of which are in conformity, and others are not, with the affidavit of debt.—*Frith* v. *Harris*, 8 D. P. C. 689.

And see WARRANT OF ATTORNEY, 3.

SEDUCTION.

(*Evidence to contradict party seduced.*) In an action for the seduction of the plaintiff's daughter, the daughter was called, and asked, on cross-examination, if she knew one A. B., which she denied. In defence, it was sought to contradict her, by proving that she stated that A. B. was the father of her illegitimate child, and that he had deserted her: Held, that the evidence was inadmissible as a contradiction, the witness not having been cross-examined as to these statements; but *semble*, that the evidence might have been given to prove her loose character. (3 Campb. 519.)—*Carpenter* v. *Wahl*, 3 P. & D. 457.

SETTLEMENT.

(*By hiring and service.*) The hiring for a year under 3 & 4 Will. 4. c. 11, to confer a settlement by service, need not be by one entire contract; if by any number of contracts the master obtains dominion over the servant for a whole year to come, it is sufficient.—*Reg.* v. *Inhabitants of Ravenstonedale*, 3 P. & D. 469.

SHERIFF.

(*Poundage.*) The sheriff has no right to poundage on a fi. fa. delivered to him, where the amount of the execution is tendered to him before levy; and a sheriff having refused to take such amount without poundage, and the defendant having paid poundage under protest, the Court determined, on motion, that the sheriff must pay it back again. (2 Tidd, Pr. 1040.) — *Colls* v. *Coates*, 3 P. & D. 511.

And see PROCESS, 1.

SPECIAL VERDICT. See CUSTOM.

STAMP.

1. (*Admissibility of unstamped instrument.*) The declaration stated, as the consideration of an assumpsit, the giving up of a certain guarantee; plea, that the plaintiff did not give up the guarantee: Held, that the guarantee might be given in evidence, though unstamped. (1 B. & Adol. 603.)—*Haigh* v. *Brooks*, 3 P. & D. 451.

2. (*When instrument is evidence of a contract.*) The following instrument, as being evidence of a contract, requires a stamp: "I hereby acknowledge that I have held the estate called, &c., as tenant to F., at the yearly rent of 60*l.* from the 4th July 1837, the rent to be paid quarterly, and I further acknowledge to owe F. 60*l.* for the first year's rent, which was due on the 4th July instant; I have, on signing thereof, paid the attorney of F. 6*d.* in part of the rent so due to him as aforesaid, A. B." (7 B. & C. 639.)—*Doe d. Frankis* v. *Frankis*, 3 P. & D. 565.

3. (*On surrender of lease.*) A deed purporting to be a surrender of a lease, and made in consideration of 120*l.* and of a new lease to be granted of the premises at an increased rent, was stamped with a 1*l.* 15*s.* stamp: Held, that it did not also require an agreement stamp, as the agreement for the new lease was part of the conveyance, and incident thereto.—*Doe d. Philipps* v. *Philipps*, 3 P. & D. 603.

4. A resolution of a company or association for the appointment of a clerk or secretary, is not an agreement, or a minute or memorandum of an agreement, requiring a stamp within the 5 Geo. 3, c. 184. (2 A. & E. 210.)—*Vaughton* v. *Brine*, 1 Scott, N. R. 258; 1 M. & G. 258.

5. (*Agreement—Partnership.*) A minute of a resolution entered in the books of a joint stock company for the acceptance of a tender for work to be done for the company, is not a minute or memorandum of an agreement that need be stamped within the 55 Geo. 3, s. 184.

The plaintiff contracted to do certain work for a joint stock company for a given sum; he afterwards caused his name to be inserted in the books of the company as a holder of shares therein: Held, that this did not affect his right to sue the company in respect of the prior contract.—*Lucas* v. *Beach*, 1 Scott, N. R. 350.

And see LEASE, 1.

SURETY. See WITNESS, 4.

TENDER.

Where a party sent to make a tender said to the plaintiff, "I am instructed by the defendant to say that 15*l.* is more than is due, but you may have it," and produced that sum: Held, a good tender.—*Thorpe* v. *Burgess*, 8 D. P. C. 603.

TITHES.

(*Distress for land-tax in respect of—Trespass, when maintainable.*) The plaintiff, who was the vicar of E., and also farmer of rectorial tithes, was assessed to the land-tax in one gross sum for the rectorial and vicarial tithes; he paid the assessment on the vicarial tithes, but refused to pay on the rectorial tithes, the land-tax on them having been redeemed; the collector, therefore, distrained under a general warrant of distress given by 38 Geo. 3, c. 5, s. 17. The plaintiff did not appeal under that statute, but brought his action of trespass: Held, that the action lay, and that the plaintiff was not bound to appeal.

The distress being made for an assessment alleged to be due on a past half-year: Held, that the collector could not justify under a distress for the current half-year, no demand having been made for the sum due for the latter period. —*Charleton* v. *Alway*, 3 P. & D. 618.

TRANSPORTATION.

Under the stat. 9 Geo. 4, c. 83, s. 9, the Governors of New South Wales and Van Diemen's land have power to revoke assignments of convicts, without any remission of their sentences.—*Bryan* v. *Arthur*, 11 Ad. & E. 108.

TRESPASS.

(*Trespass qu. cl. fr.—Description of close.*) The owner of a close called Hall Close, removed an old fence and added to his close a small slip of land adjoining a public road.

In an action for an alleged trespass committed upon this slip of land a year after the enclosure, the plaintiff in his declaration described the locus in quo as Hall Close: Held, that it was well described. *Brownlow* v. *Tomkinson*, 1 Scott, N. R. 426; 8 D. P. C. 287.

And see PLEADING, 1, 2; TITHES.

TRIAL AT BAR.

(*Right of crown to—Audience of Attorney-General in C. P.*) The crown may forbid the issuing of a writ of nisi prius in any action in which it is interested.

In such case, the course is for the Attorney-General to certify to the Court

ore tenus, that the crown has an interest in the suit, and pray that a trial at bar may be directed.

The Queen being interested in a cause in this Court, her attorney-general has the right of audience.—*Paddock* v. *Forrester*, 1 Scott, N. R. 391; 8 D. P. C. 834.

VENDOR AND PURCHASER.

(*Action for non-completion of purchase of land—Measure of damages.*) In an action for the non-completion of a contract for the purchase of land, the measure of damages is, not the amount of the purchase-money, but only such damage as the plaintiff has actually sustained by the breach of contract.—*Laird* v. *Pyne*, 8 D. P. C. 860.

WARRANT OF ATTORNEY.

1. (*Attestation.*) The Court of C. P. set aside a warrant of attorney, on the ground that the name of the attorney who attested the defendant's execution was *suggested to* the defendant by the plaintiff's attorney.—*Kemp* v. *Matthew*, 8 Scott, 399. [But see Bligh v. Brewer, 1 C. M. & R. 651; Taylor v. Nicholls, 6 M. & W. 91: post, pl. 2.]

2. (*Same.*) Where a defendant, who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, and freely adopts an attorney suggested by the plaintiff's attorney, that is a sufficient naming of the attorney within 1 & 2 Vict. c. 110, s. 9.—*Hall* v. *Dale*, 8 D. P. C. 599.

3. (*Staying proceedings in sci. fa. on judgment thereon.*) The Court will stay proceedings in a sci. fa. on a judgment on a warrant of attorney, upon a suggestion that matter occurred before the signing of the judgment, from which it would appear that nothing was due to the plaintiff, and refer the case to the Master to report.—*Greenslade* v. *Vaughan*, 8 D. P. C. 687.

4. (*Attestation.*) A defendant having consented to execute a warrant of attorney, P. prepared it, and told the defendant it must be signed in the presence of a professional man, and that he, P., should procure S. for that purpose. The defendant accordingly attended at P.'s office, and then in the presence of S., whose attendance P. had requested, signed the warrant of attorney: Held, that this was not a compliance with the statute, 1 & 2 Vict. c. 110, s. 9. (4 B. & Adol. 371; 7 D. P. C. 747.)—*Gripper* v. *Bristow*, 8 D. P. C. 797.

And see COGNOVIT.

WATERCOURSE. See PRESCRIPTION ACT, 1.

WAY.

(*Dedication.*) By their act of incorporation, 41 Geo. 3, c. 31, the proprietors of the Surrey canal were required to erect and maintain bridges over the canal, where it intersected any public-highway, bridle-way, or foot-path, and also for the use of the owners and occupiers of lands, &c. adjoining to the canal. In 1804 the company erected a swivel bridge (of sufficient dimensions to allow a carriage to traverse it) across the canal, at a spot where there had formerly been a public way, which at the most was only a bridle-way. This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants of an estate adjoining, called the Rolls' estate. The neighbourhood having become extremely populous, and a district church having been built near the bridge, the public, from 1822 to 1832, freely and without interruption, used it as a carriage-way: in 1832 the company, for the first time,

posed a toll upon all carriages traversing the bridge, with the exception of those belonging to the tenants of the Rolls' estate; and in 1834 they removed the old swivel bridge, and erected a convenient stone bridge in the place of it. In an action of trespass against the defendant for passing over the bridge without paying toll, the judge told the jury that, supposing the bridge in question to have been originally erected for the exclusive accommodation of the tenants of the Rolls' estate, still if, in consequence of the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication: Held, that this was not a misdirection; and that the evidence warranted the jury in finding a dedication.—*Surrey Canal Company* v. *Hill*, 1 Scott, N. R. 264.

WITNESS.

1. (*Competency.*) Ejectment by first mortgagee against mortgagor; defence, that the mortgage was fraudulent; the second mortgagee, called as a witness to prove the fraud, was held to be rightly rejected as incompetent. (3 Bing. N. C. 429.)—*Doe* d. *Cuthbert* v. *Bamford*, 3 P. & D. 498.

2. (*Attachment against, for disobeying subpœna.*) A witness was taken to the assizes and there kept at the plaintiff's expense until the day of trial, when she refused to go into Court without first being paid a certain sum: Held, that to entitle the plaintiffs to move for an attachment against the witness for not attending pursuant to her subpœna, they were bound to show that a reasonable sum had been tendered to the witness for her conveyance home.—*Newton* v. *Harland*, 1 Scott, N. R. 502.

3. (*Action against, for disobeying subpœna—Calling on subpœna.*) In an action against a party for not appearing to give evidence in obedience to a writ of subpœna ad testificandum, it is not necessary to show that the defendant was called on his subpœna by the officer of the Court, if it be shown by other satisfactory evidence that he was not present at the proper time and place, when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence. And in such case it is not necessary that the jury should have been sworn and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness. (3 B. & Ald. 598; 1 C. & M. 752; 3 Ad. & E. 503; 4 M. & W. 679.)—*Lamont* v. *Crook*, 6 M. & W. 615; 8 D. P. C. 737.

4. (*Competency of surety.*) In an action by the payee against one of three makers of a joint and several promissory note, another of the makers was called as a witness for the plaintiff, and stated on his examination on the voir dire, that the note had been given by the defendant as principal, and that it was signed by himself and the other maker as sureties: Held, that the witness was competent.—*Page* v. *Thomas*, 6 M. & W. 733.

WRIT OF INQUIRY.

In assumpsit on a special agreement by defendant, for certain considerations, to pay the plaintiff a particular sum of money, a judgment by default admits the sum alleged to be due, and the plaintiff is entitled to a verdict for that amount, without any evidence of damage. If the declaration also contains the money counts, the verdict in such case should be taken on the special count for the sum claimed, and on the others with nominal damages only.—*King* v. *Beak*, 8 D. P. C. 735.

And see PRACTICE, 1.

WRIT OF RIGHT.

On the trial of a writ of right, the issue being joined on the mere right, two principal questions (the ruling of the Court upon which was excepted to on the part of the demandants) were left at the grand assize; first, whether or not the demandant had succeeded in establishing her pedigree; secondly, whether a fine that had been levied by the father of tenant was so levied as to operate as a bar of the demandant's right; whether the conusor was at the time in possession of the premises claiming an estate of freehold, and whether the fine was levied in the name by which the conusor was at the time known. The grand assize found a general verdict for the tenant, accompanying it with the following statement in writing—"It is the unanimous verdict of the grand assize, that the demandant has not made out her pedigree; that the tenant had entered into, and was in the actual possession of the estates devised by the will of T. J. Selby, before and at the time of levying the fine, in 1784; and that he had taken and used, and was then known by, the name of William Selby"—a name was required by the will to assume, as the condition upon which he was to take the estate on the failure of the right heir presenting himself: Held, that this written statement could not properly be introduced into the bill of exceptions, it being a statement of that which the grand assize were not called upon by law to find.—*Davies* v. *Lowndes*, 1 Scott, N. R. 329.

WRIT OF TRIAL.

1. (*What action triable under.*) Assumpsit. The first count of the declaration was for damages sustained by the plaintiff, in consequence of the defendant's removing large quantities of hay off the premises held by him of the plaintiff, and selling or consuming it elsewhere than on the premises, contrary to his agreement with the plaintiff. The sum indorsed on the writ was 8*l.* 18*s.* The jury gave a verdict for the plaintiff, with 3*l.* 14*s.* damages. On motion to set aside the writ of trial and subsequent proceedings, it was held that the sheriff had no jurisdiction, under 3 & 4 Will. 4, c. 42, s. 17, to try this cause; and that the objection was not taken too late, though both parties had consented to try before the sheriff. (2 M. & W. 53, 851; 5 M. & W. 155.)—*Lawrence* v. *Wilcock*, 3 P. & D. 536; 8 D. P. C. 981.

2. (*Authority of sheriff under.*) Where, on the trial of a cause before the sheriff, under the Writ of Trial Act, a verdict was by consent taken for the plaintiff, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the Court set aside the verdict and judgment, on the ground that the sheriff could not so delegate his authority, but was bound to try the cause.—*Wilson* v. *Thorpe*, 6 M. & W. 721.

EQUITY.

[Containing cases in 2 Beavan, Part 1, and 9 Sim. Part 4.]

ACCOUNT SETTLED.

(*Set aside under special circumstances.*) An account between an aged tenant for life, and the remainderman, who was also executor and son of the tenant for life, such account being founded on an erroneous opinion of counsel obtained by the son on a defective statement of the case, though the suppression was not fraudulent, and being also complicated in form, and though professing to be made in conformity with the opinion, containing other matters not contemplated by the opinion, was set aside; although the tenant for life had a legal adviser of her own in the business, and there was no apparent intention in the remainderman to take undue advantage. — *Pickering* v. *Pickering*, B. 31. (Affirmed on appeal.)

AFFIDAVIT. See HUSBAND AND WIFE, 1.

AGREEMENT.

(*In restraint of partition.*) Four persons bought some land with the view of selling it in lots as building ground according to a specified plan, and agreed that none of the four should dispose of his share except in a certain manner: Held, in a suit by the representatives of one of the four against the survivors, that the agreement barred the right to a partition.—*Peck* v. *Cardwell*, B. 137.

ARBITRATION.

(*Jurisdiction—Attendance of Witnesses.*) Courts of equity have no jurisdiction under 3 & 4 Will. 4, c. 42, to order witnesses to attend arbitrators.— *Hall* v. *Ellis*, S. 530.

ASSIGNMENT.

(*Notice to Trustees.*) It was held, in a suit for specific performance by the assignee of a fund in reversion, against a purchaser from him, that it was not necessary, in order to make out his title, that he should have given notice to the trustees of the fund of the assignment, but that in the absence of notice by him, he was bound to prove that no notice had been given by any subsequent assignee.— *Hobson* v. *Bell*, B. 17.

ATTORNEY-GENERAL. See CHARITY, 3.

BANKRUPTS.

(*Jurisdiction—Injunction.*) The court has jurisdiction to restrain a party upon equitable grounds from taking proceedings under 1 & 2 Vic. c. 110, s. 8, to make a party a bankrupt; and such an injunction was granted in the case of an agreement entered into in the first instance between the debtor and his partners, but which had been confirmed by the creditor, of which the purport

was to discharge the debtor from his debt upon certain terms, which he was willing to comply with, though owing to differences between him and his partners they were yet unperformed.—*Attwood* v. *Bankes*, B. 152.

CHARITY.

1. (*Account—Discretion.*) The Court has a discretion in giving or refusing an account in Charity cases; and in a case where a sufficient ground was laid for an account, but the amount in question was small and insufficient to meet the expenses of the inquiry; the Court affirming an order made on a previous hearing before Lord Cottenham as Master of the Rolls, refused the account.—*Attorney-General* v. *Shearman*, B. 104.
2. (*Cy pres.*) Testator bequeathed 1000*l.* to "The Jews' Poor, Mile End;" there was no charity known by that name, but there were two charitable institutions for the Jews at Mile End. The legacy was divided between them.—*Bennett* v. *Hayton*, B. 81.
3. (*Parties—Attorney-General—Description of Charity.*) A bill having been filed on behalf of parties describing themselves as the "Governors of the Corporation of the Society for the Relief of Poor Widows and Children of Clergymen, commonly called 'The Corporation of the Sons of the Clergy,'" claiming a bequest given in terms to "The Governors of the Charity for the Relief of Poor Widows and Children of Clergymen, and to be applied to the Relief of Poor Widows and Maiden Daughters of Clergymen who should have attained the age of thirty years," the bill alleging that there was no other charity but the plaintiffs' at all answering the description in the will; a demurrer was allowed, because the attorney-general ought to have been a party by reason of the difference between the trusts in the will, and those on which plaintiffs held their funds.—*Corporation of the Sons of the Clergy* v. *Mose*, S. 610.

And see SUPERSTITIOUS USE, 2.

CONSTRUCTION.

1. (*Assignment of copyright.*) An author assigned to trustees, subject to a life interest in himself in the present and any new editions, the copyright of certain books, and the copies then on hand, upon trust to permit his son to manage and conduct the printing, publishing, and disposing of the said printed and manuscript books, and the copies thereof: Held, that the copies printed after the date of the deed, in the lifetime of the father, passed by the assignment.—*Rippon* v. *Norton*, B. 63.

And see INSOLVENT.

2. (*Marriage covenant.*) By settlement made on the marriage of a lady who was possessed of funded property and shares in water works, trusts were declared of the funded property alone, but there was a covenant to settle upon the same trusts all the property that the wife, or the husband in her right, might become entitled to: Held, that the shares were included in this covenant.—*James* v. *Durant*, B. 177.
3. (*Same.*) Held, that a covenant by husband alone in a marriage settlement, to settle any property which his wife or he in her right might become entitled to, did not affect property afterwards bequeathed to her separate use.—*Travers* v. *Travers*, B. 179.

CONSTRUCTION OF STATUTES. See ARBITRATION; EVIDENCE, 3; SUPERSTITIOUS USE, 1, 2; TRUSTEE, 1, 2; WILL, 10.

CONTEMPT.

(*Libel on parties.*) Pending a suit, violent attacks were published in a periodical paper upon the plaintiff and his witnesses, imputing to them respectively malice and perjury: Held, that this was a contempt in the editor of the paper.—*Littler* v. *Thompson*, B. 129.

COPYRIGHT.

1. (*Extent of injunction.*) Where some only of the parts alleged to be piratical of the work of the defendant were produced in evidence, but they were such as to justify the presumption that the general character of the work was piratical, the Court made an injunction restraining the defendant "from printing, &c. any copy of his work containing any articles copied or taken or colourably altered from the work of the plaintiff." (Mawman v. Tegg considered.)—*Lewis* v. *Fullarton*, B. 6.

2. (*Subject of.*) A work made up partly of compilations, partly of information the result of original enquiry, such as a topographical dictionary, may be the subject of copyright.—*S. C.*

And see CONSTRUCTION, 1.

EVIDENCE.

1. (*Competency—Trustee.*) In a suit to set aside certain deeds on the ground of lunacy, under which property to a small amount had been sold: Held, that the trustees of such deeds were not competent witnesses on the question of lunacy, 1st, as interested in rebutting the charge of accepting a trust from a lunatic; 2d, as chargeable with the purchase money they had received.—*Frank* v. *Mainwaring*, B. 115.

2. (*Competency—Waiver of objection.*) Cross-examination of a witness for the purpose of verifying documents: Held, no waiver of an objection to his competency generally on the ground of interest.—*S. C.*

3. (*Declaration of party.*) Where a mortgagee contracted to sell the fund mortgaged under a power given by the mortgage deed, in default of payment: It was held, that as between him and the purchaser, his declaration on oath under the 5 & 6 Will. 4, c. 42, that default had been made, was not sufficient evidence of the fact.—*Hobson* v. *Bell*, B. 17.

FRAUD. See JOINT STOCK COMPANY.

HUSBAND AND WIFE.

1. (*Affidavit.*) Where the husband resided in one of our African colonies, the affidavit of the wife alone, of there being no settlement, was admitted as ground for an order to transfer her property to a purchaser, in pursuance of a contract made by the husband while it was yet in reversion.—*Elliott* v. *Remington*, S. 502.

2. (*Separation—Fund in Court.*) A husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in Court bequeathed to the wife were, without a reference, ordered to be settled upon her and her issue generally, the remaining fourth to be paid to the husband.—*Coster* v. *Coster*, S. 606.

INFANT. See MORTGAGE; PRACTICE, 7.

INJUNCTION. See PLEADING; PRACTICE, 6.

INSOLVENT.

1. (53 *Geo. 3, c.* 102.) An insolvent who was discharged in 1815, when the above

act was in force, died in 1837, leaving property: Held, on the authority of Barton v. Tattersall, 1 Russ. & M. 237, that one of the scheduled creditors might file a bill against the executor of the insolvent for payment of his debt, out of the assets remaining after satisfaction of the other debts incurred subsequent to his discharge.—*Ward* v. *Painter*, B. 85.

2. (*Gift over, on insolvency.*) Property was settled by deed, subject to a life interest in the father, upon trust for the son for life, until he should take the benefit of the Insolvent Act, then the income to be applied by the trustees in such manner, and to such persons, for the board, lodging, and subsistence of the son and his family, as the trustees should think fit, and on the death of the son upon trust for such persons as he should appoint, or in default of appointment for his children. The son did take the benefit of the act, having at the time three children, and a wife who died before the hearing: Held, that the children became entitled to three-fourths of the life interest of the son, the other fourth passing to his assignee.—*Rippon* v. *Norton*, B. 63.

JOINT STOCK COMPANY.

(*Fraud—Parties.*) A bill against a director of a joint stock company to recover the price of some shares which he had sold to plaintiff through the intervention of a broker, alleging that defendant had, as director, been party to a system of delusion by the company, in order to raise the price of its shares, as by spreading false reports and declaring large dividends on the brink of insolvency, was sustained on demurrer, both in respect to the degree and kind of fraud, and as to the right of suing the individual director alone.—*Stainbank* v. *Fernley*, S. 556.

JURISDICTION. See ARBITRATION; PARTNERSHIP; WILL, 7.

LUNACY.

(*Issue.*) An issue was directed (in 1839) to inquire whether a certain person, then deceased, who, under a commission executed in 1835, had been found to be a lunatic since 1836, was in fact of sound mind at a particular time in 1817.—*Frank* v. *Mainwaring*, B. 115.

MINING LEASE.

(*Relief against covenant.*) Where plaintiff was the lessee of a mine at a fixed rent of 300*l.*, and subject to a royalty of 10*s.* for every wey of coals raised in each year beyond 600, and with a power to determine the lease on the coal being worked out; and after several years the mine being nearly exhausted, he was prevented by accidents from working it except at a ruinous expense; the Court refused to relieve him from payment of the 300*l.* a year; the case being distinguished from that of Smith v. Morris, 2 Bro. C. C. 311, by the reservation of the fixed rent.—*Phillips* v. *Jones*, S. 519.

MORTGAGE.

(*Foreclosure on motion.*) A decretal order on foreclosure, under 7 G. 2, c. 20, s. 2, requiring the concurrence of all the defendants who are interested in the equity of redemption, cannot be made where one of them is an infant.—*Lushington* v. *Price*, S. 65.

And see EVIDENCE, 3; STATUTE OF LIMITATIONS, 1.

PARTIES. See INFANT; CHARITY, 3; JOINT STOCK COMPANY.

PARTITION. See AGREEMENT.

PARTNER. See PRACTICE, 14.

PARTNERSHIP.

(*Jurisdiction—Preservation of property.*) The Court has, it seems, jurisdiction to interfere for the preservation of the property of the partnership, even where a dissolution is not sought; but it refused to restrain some members of a company from sending a ship belonging to the company upon a voyage not sanctioned by the committee.—*Miles* v. *Thomas*, S. 607.

PAUPER.

(*Apparent ability.*) Defendant dispaupered upon affidavit on his being apparently in good circumstances, though he still swore generally that he was not possessed of any property beyond 5*l.* and his wearing apparel.—*Romilly* v. *Grint*, B. 186.

And see PRACTICE, 8,

PLEADING.

(*Injunction.*) Where plaintiff by his bill asked for an injunction to *stay execution*, but the Court of law having afterwards set aside the judgment, he applied for an injunction to *stay trial*, it was refused.—*Thompson* v. *Byrom*, B. 15.

POWER.

1. (*Defective execution.*) Where the instrument conferring the power required it to be executed "by any deed or deeds under the respective hands and seals (of the donees) to be by them executed in the presence of and attested by two or more credible witnesses," and the form of attestation was "*sealed and delivered* in the presence of," nothing being said about *signing*: Held, that by reason of such omission the execution was invalid.—*Waterman* v. *Smith*, S. 629.

2. (*Fraudulent appointment.*) A tenant for life and his wife, who had under their settlement a power of appointment to or among their children, appointed the whole to the eldest daughter, who shortly afterwards joined with the father and mother in mortgaging the property. The mortgagee afterwards contracted to sell under a power in the mortgage deed, but before payment of the purchase-money one of the younger children gave notice to the purchaser and mortgagee not to complete, as the appointment to the daughter was a fraud upon the settlement, but he did not take any proceedings to set aside the transaction: Held, in a suit for specific performance between the mortgagee and the purchaser, that the latter was bound to complete.—*Green* v. *Pulsford*, B. 70.

PRACTICE.

1. (*Alteration of record—Affidavit.*) After affidavit filed and intituled in a cause, in which there were three defendants, plaintiff struck out one defendant: Held, that he might still use the affidavit as originally intituled, on motion for injunction.—*Hawes* v. *Bamford*, S. 653.

2. (*Alteration of record—Demurrer.*) After demurrer filed, two out of the plaintiffs procurred their names to be struck out of the bill: Held, that as the remaining plaintiffs were not parties to the act, (and their title to file a bill was not prejudiced by the withdrawal), the bill stood as before.—*Miles* v. *Thomas*, S. 606.

3. (*Clerk in Court.*) Where the same clerk in court acted for both parties, and

he applied without instruction from the defendant to the plaintiff's solicitor for a commission to take defendant's answer: Held, that this was a step taken on behalf of the defendant and binding on him, so as to prejudice his right to refer the bill for impertinence; but the case was not decided on this point alone.—*Beavan* v. *Waterhouse*, B. 58.

4. (*Examination "de bene esse."*) An *ex parte* order for the examination "de bene esse" of a witness stated to be "*in her* seventieth year, and very weak and infirm, and not likely to live long," discharged—the rule as to age requiring "full seventy years," and as to health, &c. a state of actual danger.—*M'Kinner* v. *Everitt*, B. 188.

5. (*Exception for impertinence.*) *Quære* how far an order obtained by defendant for delivery out of Court of documents (deposited in pursuance of his original answer) in order to enable him to answer the amended bill, precludes him from excepting to such bill for impertinence.—*Beavan* v. *Waterhouse*, B. 58.

6. (*Injunction.*) An answer filed on the morning on which a motion is made to extend the common injunction, is not a sufficient defence to such motion.—*Thompson* v. *Byrom*, B. 15.

7. (*Maintenance.*) Order made on petition without suit for allowance (of 450*l.* a year) for maintenance, where infant's property exceeded 1500*l.* a year.—*Re Christie*, S. 643.

8. (*Pauper—Pro confesso.*) The master having reported under 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, rule 6, that the defendant was unable by reason of poverty to employ a solicitor to put in his answer; an order was made, under the 2nd and 6th rules jointly, that a counsel and solicitor be assigned to him, and for a *habeas corpus* (under rule 2) in order to the taking of the bill *pro confesso*.—*Welford* v. *Daniell*, S. 652.

9. (*Pro confesso.*) An affidavit that deponent had used all due diligence to discover the present or late residence of the defendant without success, but that he was informed and believed that she used male attire as a disguise, in which she had been occasionally seen in a certain neighbourhood, held sufficient ground for the usual order under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3.—*Graver* v. *Temple*, S. 523.

10. (*Publication.*) On motion by defendant to enlarge publication, notice must be given to defendants.—*Brydges* v. *Branfil*, S. 643.

11. (*Reference as to title.*) Order made *on motion* for a reference as to title ought to contain the directions usual in decrees, as for production of deeds, &c. and examination of parties upon oath.—*Winterbottom* v. *Ingham*, S. 654.

12. (*Relief between co-defendants.*) In a suit instituted by the remainder-man against the trustee for the restitution of the trust fund, which had been improperly invested, to which suit the tenant for life was a party defendant: Held, that the latter could not have an account against the trustee of the arrears of interest, although he had asked such relief by his answer, the point not being raised by the bill, and there being no admission of the claim in the answer of the trustee. (See Eccleston v. Lord Skelmersdale, 1 Bea. 396.)—*Goodwin* v. *Chorley*, B. 30.

13. (*Security for costs.*) A naval officer on half-pay who held the office of captain of the port in Barbadoes, where he had resided for many years, held not liable to give security for costs. (See Lord Nugent v. Harcourt, 2 Dowl. P. C. 578.)—*Evelyn* v. *Chippendale*, S. 457.

14. (*Subpœna duces tecum.*) Where the *subpœna* required a witness to produce all books and accounts in his power relating to the disposal of a particular sum, and also all books and accounts relating to the matters in question in the suit, the description was held too general, and upon this ground, and also because the witness was only a partner, and deposed that his co-partners would not consent to the production of the books, a motion founded on the *subpœna* was dismissed with costs.—*Attorney-General* v. *Wilson*, S. 527. (See S. C. on demurrer, 9 Sim. 30.)

15. (*Trial of issue.*) Where the decree directs the issue to be tried at the next assizes, the trial cannot be postponed, without an application to the Court directing the same.—*Kebel* v. *Philpot*, S. 614.

16. (*Title of pleadings.*) Where there was an original and revived suit, and the commission to examine was intituled in both suits, but the interrogatories only in the original suit, the depositions were suppressed.

In the same cases, other depositions were also suppressed, because the interrogatories were intituled as in one cause, in which the deceased defendant and his representatives were stated to be defendants together.—*Pritchard* v. *Foulkes*, B. 133.

RAILWAY ACT.

(*Construction—Yard.*) By a Railway Act it was provided that upon application by the company to purchase part of any house, garden, *yard*, warehouse, building, or manufactory, the owner shall have the option of compelling the company to take the whole if any: Held, that a yard for bonding timber, in which there were a deal shed and two buildings containing sawpits, was not a yard within the meaning of the act.—*Stone* v. *Commercial Railway Company*, S. 621.

SOLICITOR.

1. (*Costs in cases of trust.*) Where one of two partners was a trustee under a will: Held, that the firm could only charge the testator's estate for costs out of pocket.—*Collins* v. *Carey*, B. 128.

2. (*Taxation of bill.*) Where a party became liable on his marriage to pay a bill of costs incurred partly by his wife before marriage, and partly by her first husband, he was held entitled to have such bill taxed though he had not stood in the relation of client to the solicitor.—*Waring* v. *Williams*, B. 1.

SOLICITOR AND CLIENT.

1. (*Bill for an account—Practice.*) A committee appointed by the inhabitants of A., to obtain a local act of parliament, employed plaintiff to solicit their bill, who in the course of such employ made various disbursements, and received from the committee divers sums on account, leaving a balance unpaid. A bill being then filed by him for an account, against some members of the committee, alleging that the others were out of the jurisdiction, or dead, and their representatives unknown, or too numerous, a demurrer to it was allowed, on the ground that it was not a case for an account, but simply one of taxation; the objection which was taken for want of parties also not being noticed. (Cullen v. Duke of Queensbury, and Horsley v. Bell, 1 Bro. C. C. 101.)—*Allison* v. *Herring*, S. 583.

2. (*Lien of solicitor.*) Where papers had come into the hands of a solicitor prior to the institution of the suit (which was for an administration of a testator's

estate), and he claimed a lien on them for other business relating to the administration, besides that done in the suit, a motion by a creditor for a reference, as to whether the solicitor had a lien on the papers, and that he might deliver them up to the receiver, or deposit them in Court, was dismissed, the case being distinguished from that of Baker v. Henderson, 4 Sim. 27, and Bell v. Taylor, 8 Sim, 216, by the fact, that in these cases the lien was for business done in the suit only.—*Warburton* v. *Edge*, S. 508.

3. (*Privileged communication.*) Communications made through a third person, from a client to a solicitor, are privileged, if otherwise entitled to be so.—*Bunbury* v. *Bunbury*, B. 173.

4. (*Same Case for foreign counsel.*) A case submitted since the institution of the suit to a Dutch lawyer was held privileged.—*S. C.*

5. (*Undue influence.*) As to what amount and what evidence of undue influence will be sufficient, without actual fraud, to induce the Court to set aside a transaction between solicitor and client.—See *Casborne* v. *Barsham*, B. 76.

SPECIFIC PERFORMANCE.

(*Delivery of abstract.*) Where it was stipulated that all objections to the title should be taken within twenty-one days of the delivery of the abstract, or be deemed waived, and time as to this was to be considered the essence of the contract, the stipulation was held not to apply in a case where only an imperfect abstract had been delivered.—*Hobson* v. *Bell*, B. 17.

And see PRACTICE, 11.

STATUTE OF LIMITATIONS.

1. (*Bill of foreclosure.*) The 40th section of 3 & 4 Will. 4, c. 27, which in express terms relates only to the recovery of money, may be pleaded in bar also to a bill of foreclosure, such a bill being in substance a proceeding to recover payment of the mortgage money; and the bill having been amended, after allowance of the plea, by an allegation of outstanding terms in the way of an ejectment at law and a prayer for their removal, a similar plea was again allowed.

N.B. The pleadings in the case are remarkable as a precedent.—*Desrmes* v. *Wyche*, S. 570.

2. (*Legacy.*) The 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, applies to legacies payable out of personal estate, as well as to those charged on land.—*Shepherd* v. *Duke*, S. 567.

SUPERSTITIOUS USE.

1. (*Prayers for the dead.*) Foundations for securing prayers for the souls of the dead are superstitious, within the meaning of 1 Edw. 6, c. 14, and the land or rent which had been settled to such use, is vested in the crown by that statute. *Attorney-General* v. *Fishmongers' Company*, B. 151.

2. (*Rights of crown under* 1 *Edw. 6, c.* 14—*City companies.*) Where, previous to this statute, land had been devised to the Fishmongers' Company, charged by will with certain sums, limited in amount, but much exceeding the rent hereafter mentioned, and was also subjected to other charges, of which the expense was not limited; and three years after the passing of the statute, which vested the benefit of such charges in the crown, the crown, for valuable consideration, and in pursuance of an arrangement entered into with this and other companies, granted to the Fishmongers' Company, out of the devised

lands, a rent of 53*s.* 4*d.*, which it was said in the letters-patent, they had been accustomed to pay yearly for the perpetual support of two anniversaries for the soul of the testator; and these letters patent were afterwards confirmed by the 4 Jac. 1, c. 10: Held, that the company held the lands free from *all* the charges originally created for superstitious uses.—*S. C.*

TENANT IN TAIL.

(*Effect of decree against.*) A decree against tenant in tail, directing him to bar the estate tail, but which was not complied with in his lifetime, held not binding on the issue in tail.—*Frank* v. *Mainwaring*, B. 115.

TRUSTEE.

1. (*Infant heir.*) The executors of a mortgagee, who died leaving an infant heir, having agreed to sell the estate in pursuance of a power in the mortgage deed, a conveyance was ordered in the name of the infant heir, under the 8th section of 11 Geo. 4 and 1 Will. 4, c. 60.—*Re Kent*, S. 501.

2, (*Power to make purchases.*) A. B. C. and D. purchased land on a joint speculation, reserving to each other a right of pre-emption over the shares of any that might wish to withdraw. A. died, leaving B. and C. executors and trustees, devising to them his fourth share, with power to join with the other parties in managing, selling, conveying, or making partition of the property. C., who was indebted to the concern, on mortgage of his share for the amount of his purchase money, then agreed with B. and D. to release to them absolutely, in discharge of his mortgage, but subject to his mortgage, the greater part of his fourth share, the remainder of his share being conveyed to him in severalty. B. and D. then carried to the account of A.'s estate one fourth of the amount of C.'s mortgage money: Held, on a suit by the parties interested under A.'s will, that A's estate was not entitled to the benefit of the agreement for the purchase of C.'s share, by reason of there being no power in A.'s will to purchase land, and because his executors had no right to subject his estate to the payment of C.'s mortgage money.—*Peck* v. *Cardwell*, B. 137.

And see EVIDENCE, 1.

3. (*Unknown heir.*) The case of a mortgagee leaving an heir who is not known, is within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by 4 & 5 Will. 4, c. 23.—*Re Williams*, S. 642. (See *S. C.* 9 Sim. 426; Law Mag. No. .)

VENDOR AND PURCHASER.

(*Time of performance—Costs.*) Where time is not the essence of the contract, by its original terms, it may be made so on reasonable notice by either party; but where an objection founded on such a notice is set up and fails, the defendant will have to pay the costs up to the hearing.—*Taylor* v. *Brown*, B. 180.

WILL.

1. (*Construction—Absolute interest.*) Testator, after giving his residue absolutely amongst such of his children as should be living when the youngest attained twenty-one, or the issue *per stirpes* of such of them should be dead, directed that the shares of such of them as should be daughters, and of the issue of daughters then dead, should remain in the hands of the trustees upon trust to pay the interest for the separate use of the daughters during life; and upon the death of the daughters, or in case any of them should have been dead when the youngest child attained twenty-one, that the share of each daughter should be

paid to her issue. Held, that a daughter living when the youngest child attained twenty-one, but who afterwards died *unmarried*, had an absolute interest.—*Hulme* v. *Hulme*, S. 641.

2. (*Construction—Apportionment of residue according to legacies.*) Where testator by his will gave his residue among certain legatees in proportion to the amount of their legacies, and afterwards by codicil gave other legacies to some of the same legatees, "*in addition to what he had given them by his will*:" Held, that the shares which the latter took in the residue should be proportioned to their legacies under the will only; the authority of Sherer v. Bishop, 4 Bro. C. C. 55, being questioned by the Court.—*Hall* v. *Severne*, S. 515.

3. (*Construction—Apportionment—State of fund.*) Testatrix, having a power to appoint to a person for life 150*l.*, *out of* the interest of 10,000*l.* consols, and to appoint the principal as she chose among certain other persons, by will appointed the 150*l.* for life, part of the interest and dividends of the 10,000*l.*; and as to so much of the said sum, or the securities in which it might be invested at the time of her decease as might not be necessary to be set apart to make good the 150*l.*; she appointed it to A., and afterwards by a codicil she appointed to B., after the death of the appointee for life, so much of the said sum, or the stocks and securities in which it might *then* be invested, from which the 150*l.* should have arisen. Between the dates of the will and codicil the 10,000*l.* had been sold out, and the proceeds, viz. 6,600*l.*, invested on mortgage at 5*l.* per cent. Held, that on the death of the testatrix, A. was entitled, subject to the life-interest of the annuitant, to so much of the 6,600*l.* as would produce 150*l.* in the 3 per cents, and B. only to the remainder.—*Bullock* v. *Thomas*, S. 634.

4. (*Construction—Cumulative legacy.*) By the first codicil testator gave to his illegitimate children an annuity of 100*l.* each, and a sum of 1000*l.*, with a power to certain trustees to advance 250*l.* out of it. The second codicil related to other matters. By the third codicil, having, as he said, republished the first two (in the first of which he had, as it afterwards appeared, introduced the name of *Phillis*) he proceeded to appoint two persons, different from the trustees of the first codicil, to be guardians and trustees of Phillis, and any other natural child he might have; and he gave to Phillis a specific debt of 1546*l.*, and two further sums of 1000*l.* and 4000*l.* respectively. The fourth codicil did not affect the question. By the fifth codicil, testator having then another natural daughter, Libya, and having as he said purchased other estates, declared that they should be subject to the terms of *his last will*, with the further proviso that they should be charged with two sums of 5000*l.*, to be paid to the trustees of the third codicil in trust for his two daughters, to be divested on death before twenty-one, or marriage. By the sixth codicil, the testator having then a third daughter, confirmed his will, and the second and fifth codicil; and after reciting that he had by one or both of the said codicils provided for his daughter Phillis, he gave the same provision to his two other daughters. The Court held, upon the strength of the sixth codicil, that the provisions made by the fifth codicil alone remained in force; and also intimated its opinion, but with doubt, that even independently of the sixth codicil, the legacies given by the first and third were revoked by the third and fifth.—*Robley* v. *Robley*, B. 95.

5. (*Construction—Estate in fee.*) Testator, first giving all his estates real and personal to his executors in trust to be disposed of as after-mentioned, then

gave all his real estates to his wife for life, and after her decease he gave his lands and estates to J. B.; but at his decease, the whole to be for the use of J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if they should die before twenty-one, he gave the houses and estates to H. S., to the use of himself and his children. Held, on demurrer, that the children of J. B. took only joint estates for life.—*Spry* v. *Bromfield*, S. 534. (A case has been sent to the Court of Exchequer.)

6. (*Construction—Issue—Survivor.*) The certificate of the Court of C. P. (which was altered on a second reference), declaring "issue" to be a word of purchase, was adopted without argument; it being agreed that the word "survivors" in the will, which was repeated in the certificate, should be read as "others."—*Carsham* v. *Newland*, B. 145. (See 4 Mee. & W. 101, L. M.)

7. (*Construction—Legal representatives.*) There being a bequest to A. or his legal representatives, A. being dead at the date of the will (which the testator did not know): Held, that A.'s next of kin, according to the statute of distribution, were entitled, to the exclusion of his legatees or executors.—*Cotton* v. *Cotton*, B. 67.

8. (*Construction—Life interest in leaseholds.*) Testator bequeathed to his widow, subject to such annuities and insurances as he was liable to pay, "all the interests, rents, dividends, annual produce and profits, use and enjoyment of all his the testator's real and personal estate," for life, and after giving certain legacies, he proceeded to give all the rest and residue of his estate and effects to his son-in-law: Held, that the widow was entitled to enjoy the property of the testator, including a leasehold and a determinable annuity, "*in specie*."—*Pickering* v. *Pickering*, B. 31. (Affirmed on appeal.)

9. (*Construction—Mortgaged estate.*) A. being seised of the equity of redemption of lands in N., which he had mortgaged to his father, and also of the legal estate in them as heir to his father, the mortgage being still unsatisfied, devised all his lands in N. and elsewhere in trust to sell: Held, that the legal estate did not pass by the will.—*Exp. Marshall*, S. 555.

10. (*Construction—"Or" read "and"—Default of issue.*) Testator devised lands to his son if he should attain twenty-three, or should be married with the consent of the trustees, which should first happen, and to his heirs and assigns for ever, and in case his son should die without attaining such age, *or* being married with such consent as aforesaid, should die without lawful issue, or such issue should die under the age of twenty-one years, then to testator's daughters in tail: It was the opinion of the Court that *or* ought to be read *and*, i. e. that the gift over ought only to take effect upon the death without issue taking place before twenty-three; but that, even without adopting that construction, the son would take an estate tail by the terms of the gift over, the effect of the words importing a general failure of issue not being restricted by the subsequent alternative of "such issue dying under twenty-one."—*Grimshawe* v. *Pickup*, S. 591.

11. (*Construction—Partial restraint on alienation.*) Bequest of money and leaseholds to a feme sole "for her own absolute use, without liberty to sell or assign during her natural life:" Held to confer an absolute interest without power of alienation during life.—*Baker* v. *Newton*, B. 112.

12. (*Construction—Payment of legacies.*) Where legacies given by will were made payable at twenty-one: Held, that the payment of them was not accele-

rated by a direction in a codicil to pay all legacies as far as practicable within six months.—*Frost* v. *Capel*, B. 184.

13. (*Construction—Period of survivorship.*) Testator gave to his wife for life all his remaining estates and also all his capital in trade in trust at his death for his then surviving children, except as to the rental of his estates, which he gave to *his surviving female* children, subject to certain restrictions, with a gift over (from one to the other) upon the decease of any of the children without issue, and from the last female child to the males in like manner: Held, that the surviving female children meant the children surviving his wife.—*Wordsworth* v. *Wood*, B. 25.

14. (*Construction—Separate use.*) Bequest in trust to pay income to testator's wife for her life, to be by her applied for the maintenance of herself and children by the testator: Held, not to be a gift to the separate use.—*Wardle* v. *Claxton*, S. 524.

15. (*Construction—Substitution.*) Testator having two sons and two daughters living, and having also one daughter-in-law and one son-in-law, each having children, after giving legacies equal in amount to his son-in-law, daughter-in-law, (describing them as such), his two sons, and one of his daughters, gave the residue to his other daughter for life, after her decease to be equally divided amongst such of his sons and daughters as might be living at her decease, and in case of the decease of any of his said sons and daughters, the surviving children of any of them to have their father's or mother's part: Held, that the children of the deceased son and daughter were entitled to shares. (Giles v. Giles, 8 Sim. 360.)—*Jarvis* v. *Pond*, S. 549.

16. (*Construction—Trust.*) Gift to the wife of the use of all testator's property (following an absolute bequest of 500*l.* to her) for the benefit of herself and unmarried children that they might be comfortably provided for during her life: Held, to confer on the wife and the unmarried children, so long as they remained unmarried, an equal share in the income of the property during the life of wife.—*Jubber* v. *Jubber*, S. 503.

17. (*Construction—Vesting of legacy.*) Testator desired his executor to pay 25*l.* yearly for the maintenance and education of his daughter until twenty-one or marriage, and then to pay her 500*l.* Legacy held vested.—*Watson* v. *Hayes*, S. 500.

18. (*Description—Void condition.*) Testator gave 2000*l.* to trustees in trust to empower A., whom he described as the widow of B., to receive the dividends so long as she should continue single and unmarried, but in case she should sell, assign, or anticipate such dividends, he revoked the bequest, and directed the sum should sink into the residue. At the time of testator's will and of his death, A. had married again, but having been deserted by her second husband had resumed the name of her first, not as it appeared with any intention of deceiving testator: Held, that she (or her second husband in her right, and subject to her right to a provision by reason of his desertion), was entitled to the legacy, because the mistake was not induced by fraud, and if A. had been a widow when the will took effect, the condition in restraint of marriage and subsequent alienation would have been void.—*Rishton* v. *Cobb*, S. 615. (Affirmed by Lord Chancellor.)

19. (*Probate—Jurisdiction.*) The only case in which Courts of Equity have jurisdiction to relieve against a probate, is where it has been obtained by fraud, and

where the bill alleged incompetency in the testator, which did not come to the knowledge of plaintiffs till it was too late to appeal in the Ecclesiastical Court; but the only fraud charged in reference to the probate was, that the executors in suing it had not called the medical men as witnesses; and the bill prayed that the executors might be declared trustees for the plaintiffs: A demurrer was allowed. (Barnesby v. Powell, 1 Ves. 119, 284; Kerrick v. Bransby, 7 Bro. P. C. 437; Podmore v. Gunning, 7 Sim. 644.)—*Gingell* v. *Horne*, S. 539.

20. (*Uncertainty—Residue.*) Testator having by will given the residue to his wife, made a codicil, by which, instead of the general residue, "he gave to her 10,000*l.*, to be invested in the names of trustees, the interest to be paid to her for life, and then to his daughter, and his house, furniture, plate, wines, &c. at K. R., in short, the whole of his property at his decease, except carriages and horses and his gold repeater, and it was his further wish that she might continue in either house (but not to change) and have the use of the same for life, wines, spirits, included:" Held, that the codicil, except so far as it cut down the residuary gift to the wife to 10,000*l.*, was void, for uncertainty.—*Baker* v. *Newton*, B. 112.

And see CHARITY, 3.

BANKRUPTCY.

[Containing 1 Montagu & Chitty, Part 3; and 4 Deacon, Part 1. Omitting cases noticed in former digest.]

AFFIDAVIT.

(*Amount of debt—Contradictory statement.*) A creditor, after filing an affidavit of debt to the amount of 100*l.* and upwards, under the 1 & 2 Vict. c. 10, s. 8, and bond taken by the commissioners in 200*l.* filed a second affidavit, stating the real amount of his debt to be 316*2l.* The Court declined making an order to take the second affidavit off the file.—*Exp. Rose*, Dea. 66.

APPARENT OWNERSHIP.

(*Surviving partner.*) Where the surviving partner, with a view to carrying into effect an arrangement entered into by himself and deceased partner, drew out money which at the death of their banker was standing at their bankers, and paid over to trustees in order to carry out the said arrangement; and upon the understanding that it should be returned if the arrangement failed, and it did fail, and the surviving partner was made a bankrupt: Held, that the money in the hands of the trustees was not in the order and disposition of bankrupt, but belonged to the partnership estate, which was also bankrupt.—*Exp. Simpson, re Leaf*, M, & C, 662.

APPEAL.

1. (*Leave to appeal—Stay of proceedings.*) When the Lord Chancellor, having reversed on a special case the order of the Court of Review, referred the petition back to them, but subsequently gave leave to the respondent to appeal to the House of Lords, without making any order as to staying proceedings. *Quære* how far the Court of Review has a discretion in giving or refusing to give directions consequent on the Lord Chancellor's judgment. In this case the respondents, who were the assignees, having allowed three months to elapse without appealing, the Court gave them a short day to make up their mind.—*Exp. Pollard, re Courtney*, M. & C. 643. (See S. C. before the Lord Chancellor, 1 M. & C. 253; L. M. No. .)

2. (*Time of appeal—Town and country fiats.*) The 32d section of the 1 & 2 W. 4, c. 56, which provides, that the order of the Court of Review shall be final as to any appeal touching admission of proof, unless an appeal to the Lord Chancellor is lodged within a month, is confined to London fiats.—*Exp. and re Figeon*, Dea. 217.

And see DIRECTION OF FIAT, 4; JURISDICTION; SPECIAL CASE.

ASSIGNEES. See Costs, 3, 5.

BANKRUPT.

(*Surrender after delay—Costs.*) On an application by contumacious bankrupt that he may be at liberty to surrender, the Court of Review does not appoint the time for his doing so, but leaves it to the commissioners to appoint time and place.

Where the bankrupt has long delayed the application, as he had in this case for twenty-three days, the costs of the order and the subsequent meeting fall upon him.—*Exp. and re Tarleton*, M. & C. 677.

And see Certificate; Costs; Lunatic.

BILL OF EXCHANGE.

(*Notice of dishonour.*) Proof of a bill of exchange against a bankrupt indorser, sustained, though the deposition did not set forth that notice of dishonour was given to him, the commissioners being satisfied *aliunde* that the notice was given, and such appearing on the hearing to be the fact.—*Exp. and re Marston*, M. & C. 576; Dea. 191.

BROKER.

(*Purchase on his own account.*) Where the bankrupt, being a broker, was employed as such by petitioner, and sold goods for him nominally to A. as appeared by sold note, but really to A. and himself on a joint account, as appeared by bought note, and became a bankrupt; so much of the goods as remained in his hands were ordered to be specifically delivered up to petitioner. —*Exp. Huth, re Pemberton*, M. & C. 667.

CERTIFICATE.

(*Joint fiat—Survivor.*) Where one of two bankrupts under a joint fiat died without having made the affidavit of conformity, the certificate was allowed only as to the survivor, reserving the question as to that of the deceased.—*Exp. Walmsley*, Dea. 240.

COMPETING FIAT.

1. (*Description of bankrupt.*) Where there were two sets of docket papers, in neither of which was the bankrupt rightly described, but the description in one was much more correct than in the other; the preference was given to the more correct docket paper, though subsequent in date, without prejudice to other creditors.—*Exp. Gaury, re Walter*, M. & C. 679.

2. (*Impounding fiat.*) Special order made to impound a separate fiat in favour of a separate joint fiat.—*Exp. Ravenscroft, re Beesley*, Dea. 172.

COSTS.

1. (*Assignee—Fraudulent fiat.*) An assignee under a fiat, which was annulled for fraudulent concert between bankrupt and petitioning creditor, was refused as against the latter his costs of appearing on the petition to annul.—*Exp. Caldecott, re Heath*, M. & C. 600.

2. (*Creditors.*) Where creditors had succeeded in expunging various proofs, it was referred to the commissioners to allow them reasonable costs.—*Exp. Margerison, re Haworth*, Dea. 80.

3. (*Disputed mortgage—Appeal.*) Where assignees resisted the claim of an equitable mortgage, which, having been disallowed by the Court of Review, was established on special case by the Lord Chancellor; their costs of the

appeal and of the petition to give effect to the Lord Chancellor's judgment, was ordered to come out of the general estate.—*Exp. Pollard, re Courtney*, M. & C. 643.

4. (*Opinion of counsel.*) Where counsel said at the hearing, he would not have advised the parties to do, as they were in effect directed to do, without the sanction of the Court, costs were not given against them, though the Court thought the case clear.—*Exp. Young, re Gowen*, M. & C. 599.

5. (*Unnecessary appearance—Service by respondent assignee.*) Where an order had been made in a bankruptcy under a fiat, in 1836, to stay payment of dividends till further order, to give time for parties interested under a commission in 1831, to make claim, and an order was made in 1839 for immediate payment, on petition of creditor under fiat of 1836: Held, that the assignees of 1831 need not have appeared on the petition, but that having been served by by assignees of 1836, who were respondents, they were entitled to costs out of estate.—*Exp. Catchpole, re Rickerby*, M. & C. 640.

And see BANKRUPT.

DIRECTION OF FIAT.

1. (*Bankrupt hawker.*) Where the bankrupt was a hawker without any fixed residence, and all the creditors but one, who was in Ireland, and all the witnesses resided in London, the fiat was removed there from Sherborne, of which place bankrupt was described in the docket papers.—*Exp. Martin, re Graham*, M. & C. 639.

2. (Changed from country to London.) Where bankrupt was a hawker, and had absconded, and majority of creditors, according to list obtained from his wife, and witnesses resided in London.—*Re Graham*, Dea. 212.

3. Not changed to London because great majority of creditors resided there.—*Exp. Knowles*, Dea. 213.

4. (*Dispersed creditors.*) Where two creditors, with debts amounting to £1060, lived at Cheltenham, twenty-two, with debts of £2700, in London, and fourteen, with debts of £3325, in the Midland and Northern counties, the Court of Review refused to change the direction of *fiat* to London, but the Lord Chancellor, on original petition stating the facts, and the decision of Court of Review, made the order.—*Exp. Lycett, re Wild*, M. & C. 642.

5. (*Fraud.*) A London fiat was refused against a country trader, although not a seventh part in value of the creditors resided where he carried on his business, and all the witnesses to prove the requisites lived in London, but the chief object of the fiat was to defeat an alleged fraudulent cognovit, of which the witnesses were chiefly in the country.—*Exp. Wainwright, re Mansfield*, Dea. 56.

6. (*Town and country trading.*) Where bankrupt is described as trading in London and the country, the fiat would not go to the country without special order.—*Exp. Geary, re Walter*, M. & C. 679.

EQUITABLE MORTGAGE.

(*Authority to pledge.*) A statement on petition, by equitable mortgagee, that the deed was deposited "by a party acting as the solicitor of the bankrupt," was not considered sufficient as to the authority given by bankrupt.—*Exp. Coleman, re Hood*, Dea. 245.

EVIDENCE. See BILL OF EXCHANGE; SUPERSEDING, 2.

FIAT.

1. (*Concerted fiat—Fraud.*) Though concert between petitioning creditor and bankrupt is not of itself, since the 1 & 2 Will. 4 (see sect. 42), sufficient ground for annulling a fiat so obtained, yet where the concert was for a fraudulent purpose, and there were no assets, the fiat was annulled.

N.B. The petitioning creditor's debt was clearly bad.—*Exp. Caldicott, re Heath*, M. & C. 600.

2. (*Same point.*) The same point was decided the same way in *Exp. Clare, re Glover*, Dea. 156.

3. (*Time of issuing—1 & 2 Vict. c. 110, s. 8.*) In computing the two calendar months within which the fiat must be issued, upon the act of bankruptcy under the above act and section, the day on which the affidavit of debt was filed must be included.—*Exp. and re Whitby*, M. & C. 671.

And see COMPETING FIATS; DIRECTION OF FIAT; JURISDICTION; OPENING FIAT.

FRAUD. See BROKER; DIRECTION OF FIAT, 4.

JOINT STOCK COMPANY.

1. (*Bankruptcy of registered officers.*) Where the registered officer of the company was a bankrupt, it was held, that joint creditors of the company might, for the purpose of voting in the choice of assignees (under the 6 Geo. 4, c. 16, s. 62), prove against his separate estate debts not established by action against him under the 7 Geo. 4, c. 46.—*Exp. and re Marston*, M. & C. 576.

2. (*Call for shares.*) Money due for calls on shares in joint stock bank is not such an ascertained debt as will entitle the company to prove against a bankrupt shareholder, without first taking the accounts.—*Exp. Snape, re Ransford*, M. & C. 697; Dea. 164.

3. (*Duration of time.*) Joint stock companies, under the 7 Geo. 4, c. 46, will be treated as subsisting partnerships, in spite of successive bankruptcies among their members, until their affairs are finally wound up.—*Exp. and re Marston*, M. & C. 576.

4. (*Joint and separate estate.*) Joint stock companies, formed under the 7 Geo. 4, c. 46, do not differ from an ordinary partnership, as regards the effect of the 6 Geo. 4, c. 16, s. 42, so that the joint creditors of the company are allowed to prove against the separate estate of a bankrupt member, so as to entitle them to vote in the choice of assignees, and the allowance of the certificate. Observations on the evils incident to joint stock companies.—*Exp. and re Marston*, M. & C. 576; Dea. 576.

5. (*Ostensible shareholder.*) A person who has been returned to the stamp office, under the 7 Geo. 4, c. 46, as a shareholder in a joint stock company, remains liable as such to the world till an altered return has been sent in, or *till by some equally notorious act he has been discharged from his liability.* Accordingly, where A. having been returned a shareholder in November, agreed at that time to sell his shares to B., who was in December elected a director of the company in respect of those shares, but the final deed of transfer from A. to B. was in March, proof was admitted against the estate of A., upon bills

which had been indorsed to the petitioners by the company in February.—*Exp. Prescott, re Phillips*, M. & C. 611.

6. (*Proof between members.*) A joint stock company admitted to prove by their registered company against the joint estate of A. B. and C., though A. and B. were also members of the company, and though, as decided in *Exp. and re Marston*, supra, the joint creditors of the company might also prove against the separate estates of A. and B.

Proofs between partners are not governed by any reasoning founded on the probability of a surplus.—*Exp. Law, re Hague*, M. & C. 590.

JURISDICTION.

1. (*Chancellor—Fiat—Special case.*) Permission having been granted by the Lord Chancellor to argue the following points, for which purpose he suggested a petition as the proper course (Re Hall, M. & C. 489), and a petition having been presented accordingly, it was decided, that, after an order of the Court of Review, reversing the adjudication upon which the order of the Chancellor annulling the fiat is founded, had issued in this case, the Lord Chancellor had no original direction to recall his order annulling the fiat, and direct a procedendo under it.

It was also decided, treating the petition as one of appeal, that the manner of settling the special case, which was objected to by the petitioner, could not be made the subject of appeal, although the Chancellor has, by the 3rd section of the 1 & 2 Will. 4, c. 56, s. 38, power to direct an appeal to be brought before him otherwise than by special case. (Exp. Keys, 3 Dea. & Chit. 263; 1 Mont. & Ayr. 226; commented on.)—*Exp. and re Hall*, M. & C. 489; *Exp. Stubbs, Re Hall*, id. 511.

And see SUPERSEDEAS; FIAT.

2. (*Submission.*) Where the petitioner, who claimed, as equitable mortgagee, a lien upon property of the bankrupt in his possession, refused by his counsel at the hearing to pledge himself to abide by the decision of the Court as to delivery of the property, the Court, considering that they could not on the present occasion make an order directly for such delivery, proceeded to hear it in spite of such refusal.—*Exp. Coleman, re Hood*, Dea. 242.

And see APPEAL.

LUNATIC.

1. (*Power of attorney—Proof under.*) Where A. acting under a power of attorney of creditor, assented to an arrangement by which the joint liability of two debtors of his principal was transferred to one, who afterwards became bankrupt, and the principal was afterwards found, under a commission, to have been a lunatic previous to the date of the power, and A. was appointed his committee, and proved as such under the above arrangement against the separate estate, the Court upheld the proof against the petition of other creditors, lunacy not being of itself conclusively a revocation of a power. (Sergison v. Sealey, 2 Atk. 411.)—*Exp. Bradbury, re Walden*, M. & C. 625.

2. (*Certificate.*) Bankrupt having become a lunatic, a next friend allowed to make the usual affidavit on his behalf, in order to the allowance of the certificate.—*Exp. and re Roberts*, M. & C. 653.

MORTGAGE. See COSTS, 3.

NEXT FRIEND. See LUNATIC.

OPENING OF FIAT.

(*Opposing creditor.*) A creditor will not be permitted to dispute by himself or his counsel the validity of the fiat at its opening, although he swears that the party is not a trader, and that the fiat is issued for a fraudulent purpose.—*Exp. Cooke*, Dea. 78.

PARTNERSHIP.

1. (*Proof—Where partner solvent.*) The rule that a joint creditor cannot prove in competition with a separate creditor, where a bankrupt has a solvent partner, is founded on the supposition of there being a legal remedy against such solvent partner, and does not apply to the case of a partner dying solvent, the right of action at law being only against the survivors.

   It was held also in the same case, that the rule did not take effect when a partner who was solvent at the time of the proof had become insolvent at the time of the petition to expunge.—*Exp. Bauerman, re Lomax*, M. & C. 569.

2. (*Same—Joint contract.*) The rule referred to in preceding entry applying only to a partnership, held not to apply to the case of joint undertaking by assignees of an insolvent's estate, to carry on his business for benefit of creditors.—*S. C.*

And see APPARENT OWNERSHIP; JOINT STOCK COMPANY, 3, 4, 6.

PETITIONING CREDITOR'S DEBT.

1. (*Partial trading.*) Where part only of the debt has been contracted during the trading, and the other after it had ceased, the debt is not sufficient. *Secus* where part has been before the trading, and the remainder during it.—*Re Dolby*, M. & C. 636.

2. (*Solicitor's lien against assignees.*) The solicitor to the petitioning creditor has an *equitable* lien on money in his hands belonging to the assignees; and on a subsequent bankruptcy of one of the assignees, in which the solicitor was petitioning creditor, the Court refused to treat his debt as diminished by the amount of money retained as above.—*Exp. Smythies, re Southall*, Dea. 118.

And see JOINT STOCK COMPANY, 2.

PRACTICE.

1. (*Attendance of Creditor.*) Order made *nunc pro tunc* for attendance of petitioning creditor at opening of fiat.—*Exp. Whipley, re Atkinson*, M. & C. 642.

2. (*Bankrupt mortgagee.*) A petition to declare bankrupt a trustee, and for conveyance of mortgaged premises, is of course; and it is improper to serve either the assignees, or the bankrupt, or the heir of mortgagor.—*Exp. Smith, re Parker*, M. & C. 598.

3. (*Bankrupt trustee.*) The appointment of a new trustee in room of the bankrupt is quite of course, though in this case the bankrupt opposed it.—*Exp. Smith, re Dry*, Dea. 214.

4. (*Extension of time—Change of list.*) Where in consequence of the refusal of some, and the disability of others of the commissioners to act, the fiat could not be prosecuted, an alternative order was made that petitioning creditors might either have a wholly new *fiat*, with an extension of time, or amend the existing fiat by adding the names of fresh commissioners, the time remaining the same.—*Exp. Castle, re Todd*, M. & C. 654.

5. (*Reference—Affidavit.*) On a reference to the registrar, he is at liberty to

receive in evidence the affidavits filed in support of the petition.—*Exp. Smythies, re Southall*, Dea. 112.

6. (*Reference—State of facts.*) On a reference to the registrar, it is not incumbent on a party to bring in a formal state of facts, unless he is required to do so by the registrar.—*S. C.* Dea. 110.

And see APPEAL, 2; CERTIFICATE; COMPETING FIAT, 1, 2; FIAT.

PRINCIPAL AND SURETY. See SPECIAL CASE, 1.

PROOF. See BILL OF EXCHANGE.

REFERENCE.

1. (*Construction of order.*) Where, on a petition to supersede, charging that the debt, which was for a bill of costs, was insufficient, by reason of negligence of attorney in action, where such costs were incurred, and because he had agreed to take costs out of pocket only, an order was made by consent, referring to the registrar in terms only the question of negligence, but with liberty to state special circumstances: Held, on exception to his report, that he ought to have entertained the question of the agreement as to costs out of pocket.—*Exp. and re Southall*, M. & C. 656.

   The Court refusd to rescind the order, or to rehear the petition in the above case, in *Exp. Smythies, re Southall*, Dea. 99.

2. (*Construction—Costs of action.* There being first a general reference to ascertain what was due in respect of a bill of costs, and a second reference to the Registrar to review his report as to the taxation of the costs of an action (which was brought by assignees in another bankruptcy): Held, that under the last reference he might include the costs of an application by such assignees for the substitution of a new petitioning creditor, and the costs of supporting the order of substitution.—*S. C.* Dea. 114.

SPECIAL CASE. See APPEAL; JURISDICTION; see also at the end.

SOLICITOR. See PETITIONING CREDITOR'S DEBT; SUPERSEDED FIAT.

SUPERSEDED FIAT.

(*Enrolment—Jurisdiction.*) The Court retains jurisdiction over a superseded fiat, and ordered it to be enrolled with costs against the respondents, on the petition of the alleged bankrupt, who wished to use it in evidence in an action against the parties who had sued it out. *Quære*, whether the superseded fiat is subject to solicitor's lien? that lien cannot at any rate be set up to resist the enrolment in such a case as this.—*Exp. and re May*, M. & C. 619.

SUPERSEDING.

1. (*Acquiescence.*) Fiat maintained where a year suffered to elapse, together with other acts of acquiescence, before petition to annul.—*Exp. and re Forrester*, M. & C. 637.

2. (*Old commission.*) Commission being in 1804, and assignees dead, the Court would not, on composition with all creditors who could be found, and payment into Court of amount of debts of others, supersede without a new choice of assignees. N.B. The proceedings being lost, the Commissioner was allowed to proceed on the list of debts set out in petition.—*Exp. and re Monk*, M. & C. 637.

TRUSTEE. See PRACTICE, 3.

WITNESS.

(*Examination before Commissioner.*) Where Commissioner had ordered witness to attend for examination, Court of Review has no jurisdiction to dispense with the examination, but the witness being old and infirm, offered a commission to examine her at her residence.—*Exp. Shaw, re Kirkby*, M. & C. 624.

SPECIAL CASES.

1. *Exp. Holmes, re Garner*, 3 Dea. 662; Law Mag. No. 46. The decision in this case was reversed on special case, it being decided that the acceptor of bills as a surety, who had paid them in full to the creditor of bankrupt, *had* a right to recover from such creditor the dividends which he had received from bankrupt's estate.—Dea, 12.

2. *Exp. Walker, re Fidgeon*, 3 Dea. 672; Law Mag. No. 46. The decision in this case, establishing that the terms on which a bond was deposited by a surety of the bankrupt, might be ascertained by evidence external to the bond affirmed. —Dea. 217 (where the name of case is *Exp. and re Fidgeon*).

And see JURISDICTION.

ADMIRALTY.

[Containing 3 Haggard, Part 2.]

ADMIRALTY.

(*Office and jurisdiction of Lord High Admiral—Droits.*) The origin and limits of the office and jurisdiction was fully considered, and it was decided that it begins on the coast of the kingdom regularly at low water mark, and obtains, alternately within the land jurisdiction, whether by Common Law or grant, over the space between high water mark and low water mark, and it was the opinion of the Court, that a grant to a private person in derogation of these limits was void.

The limit of three miles below low water mark is a territorial limit between nation and nation.—*The King* v. *Forty-nine Casks of Brandy*, 257.

BOTTOMRY.

1. (*Necessity—Mortgagee.*) Bond given by master and also the executor of sole owner, such executor having ample credit: Held void against a mortgagee, of whose mortgage the bond-holder had notice—without costs.—*Dunvegan Castle*, 2, 331.

2. (*Necessity—Threat of arrest.*) Bond given under threat of arrest for advances not made on condition of bond, pronounced against with costs.—*Hersey*, 404.

3. (*Purchaser of bond without notice.*) A public advertisement for sale of a bottomry bond does not discharge a purchaser from the obligation to inquire into the fact of "an unprovided necessity."—*Prince of Saxe Cobourg*, 387.

BOUNTIES.

(*Destruction of pirates.*) Upon the destruction of piratical proahs, bounties, in respect of their crews, decreed.—*Piratical Proahs*, 426.

COLLISION.

1. (*Close hauled and free—Costs.*) A vessel close hauled, and which ought therefore to have held on, in order to get out of the way of a vessel going free, which had neared her without altering her course, attempted to wear, and was run down by the other vessel, who had changed her course at the same time: Held, according to the opinion of the Trinity Master, that the collision was imputable to the former vessel; but the other vessel not having endeavoured to assist after the accident, the owner was condemned in the costs.—*Celt*, 321.

2. (*Consequential damage.*) Claim for consequential damage to cargo arising from leak made by collision, rejected, on the ground of subsequent negligence, damages for collision itself being given.—*Eolides*, 367.

3. (*Different tacks.*) A vessel going free and on the larboard tack, run down in a dark night another vessel close hauled and on the starboard tack, the former condemned in damages and costs.—*Chester*, 316.

4. (*Same.*) If two vessels are beating to windward on opposite tacks, it is the duty of the one on the starboard tack to hold on, and of the other to give way.—*Jupiter*, 320.

5. (*Extent of liability.*) The liability of owners, which is limited to the value of the ship doing the damage: Held, not to be increased by bail having been given ultra that value.—*Richmond*, 431.

6. (*Foreign vessel—Licensed pilot.*) An appearance under protest by foreign vessel, setting forth sections 2, 55, and 58 of the Pilot Act, 6 Geo. 4, c. 125, and alleging that she had a licensed pilot on board, with a view of raising the legal question of her liability under these circumstances: overruled with costs. (See the *Girolamo*, 3 Hag. 169; L. M. 70.)—*Gladiator*, 340.

7. (*Steamer.*) Principles applicable to steamers. Full amount of damages and and costs given against steamer who was going in a fog with unabated speed in a track frequented by coasters, and who did not, when hailed, immediately back her engines.—*Perth*, 414.

CONTEMPT.

(*Removal of ship.*) An attachment against the master, who was also part-owner, and the mate, for forcibly removing a ship when under arrest, and a monition against others, supposed to be privy to the removal, to shew cause.—*Petrel*, 255.

DERELICT.

(*Wages out of*—1 *Will.* 4, *c.* 24.) This statute vesting the casual droits of the Admiralty in the public, with a saving of certain rights exercised by Crown or other lawful authority: Held, not to affect the right of seamen to receive out of the proceeds of a derelict, wages due to them prior to the act.—*Speculator*, 330, note.

FOREIGN SHIP.—See COLLISION, 2; SALVAGE, 7.

FREIGHT.

(*Mortgagee and bondholder.*) Monition to bring in freight, in order that it might be applied in part discharge of the bond, refused to a mortgagee of the ship, though the proceeds, on which alone he had a lien, were insufficient to pay him. —*Percy*, 402.

GRANTS OF THE CROWN.

(*Admiralty droits.*) Semble, that the crown has no power to grant to a private person the perquisites of an office of state, as, for instance, droits of the Admiralty, which, even in the absence of any evidence of there being a Lord-High-Admiral at the time of the grant (which was in the reign of Richard II.), must be considered as belonging to the Crown in its office of Admiralty.—*The King* v. 49 *Casks of Brandy*, 257.

JURISDICTION.

1. (*Magistrate*—5 & 6 W. 4, c. 19, s. 15.) The summary jurisdiction given to magistrates by this act, in claims for wages under £20, is confined to cases where the quantum only is in question, and a protest founded on a previous decision by a magistrate under the act, where the defence set up was the forfeiture of the balance due, was dismissed.—*Edwin*, 364.

2. (*River Thames.*) Held, on prohibition, that a case of collision happening in the river Thames near Hole Haven was not within the jurisdiction of the Admiralty.—*Eliza Jane*, 335. (See note at the end.)

N.B.—The 3 & 4 Vict. c. 65, s. 6, gives jurisdiction to the Admiralty in all cases of collision and salvage of *sea-going* ships, whether or not within the body of the county. See APPENDIX.

MORTGAGEE. See COLLISION, 5; WAGES, 4.

OWNER. See WAGES, 2.

PLEADING.

(*Undue length.*) Two articles in a defensive allegation rejected as unnecessary, because they repeated the facts stated by plaintiff in his summary petition, and a third article compressed.—*Test*, 2, 307.

And see COLLISION, 6.

PRACTICE.

(*Wages—Time of bringing action.*) An action for wages entered before the time allowed by law, under 5 & 6 W. 4, c. 19, s. 11, sustained, the demand having been previously contested, and bail having been given by defendant without protest.—*Test*, 2, 307.

And see COLLISION, 6; CONTEMPT.

PURBECK ISLAND.

The limits of the shore and waters belonging to Purbeck Island considered and stated in *The King* v. 49 *Casks of Brandy*, 257.

SALE OF SHIP.

(*Invalid sale—Absent purchaser.*) Upon affidavit of sale at an undervalue by agent of Lloyd's, without authority of owners, the ship having been abandoned by master, after time given for appearance of purchaser, order made ex parte for giving possession to former owners.—*Lagan, otherwise Miman*, 418.

SALVAGE.

1. (*Amount.*) Eighty guineas, instead of twenty, given, on a value of 3000, for piloting into Portsmouth a dismasted vessel, bumping near Haslar Hospital.—*Nicolaas Witsen*, 369.

2. (*Amount—Conjoint salvors.*) £400, on a value of £1200, given to steam-tug, which had been sent for, for towing a stranded steamer into harbour; also £100 to a lieutenant and five men of the coast guard who came on board, on being sent for, although other boatmen and pilots had received, under an agreement, £150 for their services.—*London Merchant*, 395.

3. (*Amount—Numerous salvors.*) £2000 given on a value of £10,500, the salvors being numerous and the risk great.—*The Branken Moor*, 373.

4. (*Amount—Special case.*) A moiety of value on the amount of goods saved given to a ship who had gone 500 miles out of her way, and saved valuable property with great risk and exertion.—*Martha*, 434.

5. (*Amount—Towing by steamer.*) £1000 given on a value of £13,246 to a steamer for salvage by towing, without risk to herself, into a place of safety, a vessel in a helpless state and in imminent danger.—*Traveller*, 370.

6. (*Apportionment.*) Of £900 awarded to steamer for salvage by towing, £450 was given to the owners, £50 to master, £400 to officers and crew.—*Earl Grey*, 363.

7. (*Apportionment—Foreign ship.*) The same rule as to apportionment which obtains in the case of an English ship, applied to a foreign one.—*Columbia*, 428.

8. (*Apportionment—Passengers.*) £2000 on £1700 value of property saved, decreed against an American ship for salvage by transhipment of cargo and crew, and in the apportionment equal shares were given to passengers and seamen.—*Hope*, 483.

9. (*Interference by salvors.*) Prior salvors, except in cases of derelict, have no right to exclude further assistance, and such an attempt on their part was held to diminish their claim.—*Dantzic Packet*, 383, (and see cases in note.)

10. (*Liability of owner.*) Upon a claim for salvage, the ship being on her voyage, monition decreed against the owner.—*Meg Merrilies*, 346.

11. (*Proximate danger.*) Claim of salvage for tendering assistance to a foreign ship in *proximate* danger of running a ground, but who shifted her course before boarded by salvors, dismissed with costs.—*Giacomo*, 344.

12. (*Quasi derelict.*) A Dutch ship assisting a British merchantman and taking on board the crew and passengers, who were about to leave her and the valuables, held entitled to salvage on the property saved as on a derelict.—*Columbia*, 428.

13. (*Ships of war.*) The claims of H. M. ships for salvage for assistance to British merchantmen are more rigorously examined than those of other ships.—*Rapid*, 415.

14. (*Towing.*) 600*l.* given on a value of 21,000*l.* for towing, without risk on either side, and the facts of the case not amounting, in the opinion of the Trinity Masters, to salvage.—*Isabella*, 427.

WAGES.

1. (*Deceased seaman.*) On an application by master under 4 & 5 Will. 4, c. 52, s. 30, to receive out of proceeds of ship wages due to seaman who had died on the voyage, to be paid to the Seaman's Hospital for the next of kin of the deceased, the owner should appear, and *semble* also, there should be a consent by the Seaman's Hospital.—*Dunvegan Castle*, 329.

2. (*Faults on both sides—Costs.*) Suit for wages by a chief mate, who after having served in that capacity for some months (during which he was suspended for a week) and then finally disrated; dismissed, but without costs, there being some degree of passion and imprudence imputable to the Master, who was sole owner.—*Lima*, 346.

3. (*Jurisdiction—Amount.*) A suit for wages amounting to 8*l.* 8*s.* 6*d.*, dismissed as *coram non judice*, the 5 & 6 Will. 4, c. 19, requiring all claims of wages under 20*l.* to be disposed of by a magistrate. The claimant also had no merits.—*Test*, 1, 305.

(*Opposing mortgagee.*) *Quære*, as to right of mortgagee to appear as an opposing party in a suit for wages, though owner a bankrupt and the proceeds of the ship were insufficient to pay mortgage.—*Prince George*, 376.

5. (*Quantum meruit—Purser.*) Wages decreed to a purser under an agreement in general terms, on the footing of a *quantum meruit*.—*S. C.*

WRECK OF THE SEA.

1. (*What passes by the words.*) A grant of wreck of the sea does not include what is commonly called *flotsam*, which is droits, but it does include, 1, goods found

at low water, between high and low water mark; 2, goods, between the same limits, partly resting on the ground, but still moved by the water.—*The King* v. *Forty-nine Casks of Brandy*, 257.

2. (*Same.*) The same point was decided the same way, and it was also held, as to goods which have touched the ground, but have been again floated by the tide, and are within low water mark, that the right of the grantee of wreck of the sea, will depend upon circumstances, as whether they were seized by a person wading, or swimming, or in a boat.—*The King* v. *Two Casks of Tallow*, 294.

3. (*Obligations of grantees.*) The obligation of such grantees to wait a year and a day for owners or insurers, and to advertize for them, and to reward salvors and those who secure the property wrecked, adverted to in *The King* v. *Forty-nine Casks of Brandy*, 257, and also in *The King* v. *Two Casks of Tallow*, 294.

HOUSE OF LORDS.

[Containing 3 Clark & Finnelly, Part III]

APPEAL.

1. (*Competency—Individual member of burgh.*) Where the summons charged "the Lord Provost, Magistrates, and Town Council," by this general description, and then, according to what was alleged to be the practice in Scotland, proceeded to charge the Lord Provost by his name and description, the Magistrates and Council successively by their names and descriptions, praying that for themselves, and as representating the community, they might be declared liable under an agreement relating to a trust fund, and judgment was given against the defenders generally, declaring them liable in expences, no part of which was to be borne by the fund in question: Held, that each of the defendants, *appearing* to be individually liable under the judgment, was entitled to appeal.—*Gray* v. *Forbes*, 356. (The beginning of the case is in No. 2, 3 C. & F.)

2. An appeal by one of several plaintiffs is competent.—*Colvin* v. *Hartwell*, 484.

CONSTRUCTION.

(*Shifting clause—Younger son or daughter.*) Testator having seven children in the following order,—Thomas, Anne, Mary, Elizabeth, Catherine, William, and Charles, and three estates, A., B., and C., devises A. to trustees to settle it upon Thomas for life, remainder to his first and other sons in tail male, remainder to William and his sons in like manner, remainder to Charles and his sons, remainder to any younger son and his sons in like manner, and in default of such issue remainder in tail general to the sons successively, first of Thomas, and so on, remainder to the daughters successively, first of Thomas, and so on, in tail, remainder to Anne for life, remainder to her sons successively, first in tail male, then in tail general, remainder to her daughters in tail, with similar remainders successively to Mary, Elizabeth, and Catherine, and any after-born daughters, and their issue respectively. Testator then devised B. to be settled in the same manner as estate A., but on *William first* and his sons, then to Charles and his sons, then to Thomas and his sons, his second son being put first and the eldest last, and the remainders to the daughters and their issue, beginning with *Mary* and ending with *Anne*. Testator then devised estate C. in the same manner as estates A. and B., but first to *Charles* and his sons, then to Thomas and his sons, then to William and his sons, putting the *second* first and the eldest last, and the remainders to the daughters and their issue, beginning with Elizabeth, the third daughter, and ending with Mary. In the case also of estates A. and B., the person entitled was to take a particular name or arms; with a proviso, that if estate B. came to the eldest son, he might still retain the name and arms attached to A. There was a shifting clause as to B., by which, in case estate A. should

come to William or Charles, or to *Mary*, Elizabeth, or Catherine, or any subsequently born daughter, or to any of the issue of the said sons or daughters, and there should be any younger son or daughter, or issue of such younger son or daughter, then estate B. would shift to him, her, or them, but on subsequent failure of any son or daughter younger than the son or daughter from whom estate B. should have shifted, then it was to revert as if there had been no shifting clause. There was also a similar clause of shifting and reverter as to estate C. in case estate B. should come to *Charles*, or to Elizabeth or Catherine: Held, reversing the judgment of Sir John Leach, which had been affirmed by Lord Lyndhurst, that the shifting clauses only took effect from son to son, and from daughter to daughter, and that the words younger son or daughter in those clauses being distributively, and therefore that in the events that happened, viz. the death of William in testator's lifetime, and that of Thomas afterwards, without issue, Charles and his issue were entitled to the three estates.—*Scarisbrick* v. *Eccleston*, 395.

JURISDICTION.

(*Municipal elections—Court of Session.*) *Semble*, that the Court of Session has not jurisdiction to interdict an election which is actually in progress, and that in the case of an election actually complete, which they have the jurisdiction to annul, they should not exercise that jurisdiction by bill of suspension and interdict, which would interrupt the functions of the officers, without creating a vacancy to be supplied.—*Monteith* v. *M'Gavin*, 459.

MARRIAGE CONTRACT.

(*Construction.*) In a marriage contract the husband covenanted to secure to his wife the benefits of the pension or annuity payable to the widow of subscribers to a certain fund to which he was a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to her, saving and excepting only her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude her from all benefit thereby." By the rules of the fund, which was the Bombay fund, the widow of a subscriber was only entitled to receive any thing during widowhood, and a deduction was to made from the allowance, "of the amount received from Lord Clive's fund." The husband died. The widow did not receive any thing from Lord Clive's fund, the fortune left by her husband excluding her under that fund; but the Bombay fund deducted from the allowance what she would have been entitled otherwise to receive from the Clive Fund. A further deduction was also made by reason of a deficiency in the fund. Finally, on her second marriage the allowance was stopped: Held, that the first husband's estate was bound under his covenant to make good the deficiencies and the failure occasioned by each of the above causes.—*Taylor* v. *Hosack*, 380. (Scotch Appeal.)

SET-OFF.

(*Money on separate account.*) Parties in Calcutta, constituting a firm A., and having, as such, dealings with a house B. in London, who acted as their agents, employ them to receive for them the dividends of stock in England, which had been bequeathed to them by their father, (whom they succeeded in the firm, and who had also employed house B. as his agent,) and they request house B. to carry the dividends to a separate account in their different names. The dividends were accordingly received by house B., one of the partners taking out ad-

ministration for the purpose, and in their correspondence with the firm A. they treat them as a separate item of account, but it did not appear clearly from the correspondence what was the understanding as to these monies being or not being applicable to the general account The house of A., which did not then include all who were beneficially included in the stock, becoming afterwards indebted, assigned all their property to trustees for their creditors: Held, reversing the judgments of the Vice-Chancellor and Lord Chancellor (Lord Brougham), that all the interest of the then firm in the stock passed by the assignment, and that house B. had no right to retain in payment of a debt to them any part of the dividends received after notice of the assignment.—*Colvin* v. *Hartwell*, 484.

SCOTCH BURGHS.

(*Municipal elections*) The municipal qualification in all Scotch burghs returning members or a member to parliament, by 3 & 4 Will. 4, c. 76, being founded on the parliamentary elections, the list of electors is, under the 4th section, made out on a particular day, 16th September, in each year, by a transfer from the parliamentary register to a separate roll: Held, that such list was conclusive for the year as to municipal elections, although the name of a party might have been subsequently on appeal (which must have been presented before the 15th September) struck out from the parliamentary register.—*Monteith* v. *M'Gavin*, 459.

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THE TIMES AND MR. JUSTICE PATTESON.

Mr. Justice Patteson is generally and justly regarded as one of the most valuable judges on the bench, after making all due allowances for his deafness. The bar would return a unanimous verdict to this effect. It was therefore with equal regret and astonishment that we read an article in the Times a few weeks ago, peremptorily calling on him to resign, on the ground of his being hopelessly incapacitated by his infirmity. It was alleged that he had been guilty of the strangest inconsistencies — transporting one prisoner for a larceny more like a drunken frolic than a deliberate robbery, and letting off another who had attempted to commit a murder by stabbing, with six months' imprisonment! The cases in question were those of Eliza Davis and Simon Huggar.

Eliza Davis was indicted for stealing from the person of Ann Phillips. The prosecutrix had known the prisoner, but was never in her company; they met in Angel Alley, Whitechapel, about midnight: Davis asked Phillips to give her some money; Phillips said she had none: Davis then hit her on the mouth with her fist, put her hand into her bosom, and took out her purse. Phillips turned back to get away, when Davis, finding nothing in the purse, followed, hit her across the nose and eyes, tore her bonnet off, threw her down in the mud, and ran off with the bonnet. During the two following days, Phillips was unable to appear, on account of the swollen state of her face; on the night of the third she met the prisoner, and, after a brief altercation, gave her into custody. The prisoner denied the robbery; but the police discovered the bonnet in a secret place in her lodging, and it appeared that the velvet trimmings had been converted into cuffs for her own dress. Verdict—Guilty, with recommendation to mercy. Sentence—Ten years' transportation.

Simon Huggar was indicted for stabbing Charles Bryan with a felonious intent. Both were Swedish sailors. Bryan was lodging at a public-house, where the prisoner and two other sailors had been drinking; about ten, Bryan endeavoured to get them out of the house, and a scuffle ensued. They were on the outside, and he was endeavouring to shut the door, when one of them cried out, "Come out, and we'll give you what you deserve." He pulled off his jacket and went out. Two walked away. The prisoner remaining, Bryan told him to go on board his ship, and seconded the intimation by a blow on the head with his fist. Whilst his arm was raised, the prisoner struck him a back-handed blow on the side with a knife. Bryan, as he levelled his blow, exclaimed, "There is something for you;" and the prisoner, as he returned it, retorted, "There, you have got something better." The wound was about two inches in depth. Bryan put his hand to his side, and walked back into the house; but soon fell from loss of blood, and was carried to the hospital. The prisoner was apprehended on board his ship, and received his discharge in consequence. The jury found him guilty of the assault only. Sentence—Six months' imprisonment, with hard labour.

The Times exclaims: "Ten years' transportation to a young female who tore a bonnet from the head of her fellow-prostitute, and afterwards appropriated to her own use some of the trimmings! six months' hard labour to a ruffian sailor, who

drew the knife and committed a murderous assault upon his countryman!" Far be it from us to justify the use of the knife, but foreigners are less tolerant of blows, and more familiar with knives, than Englishmen; and the jury distinctly negatived the murderous premeditation or intent. As to the case of Eliza Davis, it was a clear robbery, without one mitigating circumstance. Had it been a simple larceny, the judge could not have transported for ten years. The Times has evidently been led into a misapprehension by its own report, which is silent as to the purse.

A third case, mistaken in this article, is that of John Betts, indicted for manslaughter. The prisoner and one Redman got very drunk, and quarrelled at a public-house. Betts struck Redman a blow, which knocked him down. The landlord interfered, and put Betts out of the house. He remained for nearly half an hour on the outside, swearing he would wait for two hours to have his revenge. The next time they were seen together (about an hour and a half afterwards) Betts had got Redman down, and was said (but the accounts were confused) to be beating him about the head. On their being separated, Redman's leg was found to be broken. He was taken to the hospital, and died of the mortification which ensued. The medical attendant attributed his death to a bad habit of body, and distinctly stated that there were no bruises about the head. Betts was very drunk throughout the whole transaction, and the jury recommended him to mercy on that account. Sentence—One year's imprisonment, with hard labour. The Times calls this a murderous assault, wanting no circumstance but sobriety to make it a felonious homicide. This would be true, if Betts, when he threatened revenge, intended murder, but he probably intended nothing of the sort, and the fracture, the immediate cause of death, was an accident. It should also be remembered in estimating the amount of punishment, that demeanour, character, and numerous evanescent circumstances which cannot be conveyed by a report, are taken into account by the judge.

The cases of Huggar and Betts are contrasted with that of Eliza Davis, and the public are confidently called upon to infer—what, indeed, is described as little short of morally certain—that the judge could not have heard the jury recommend the female prisoner to mercy, or that some of the distinctive circumstances must have escaped his notice by reason of his infirmity. The simple answer is, that the recommendation may be seen amongst his notes; and any one who has observed Mr. Justice Patteson closely, must be aware that he invariably insists on hearing everything. In fact, the letters of complaint, to which the Times alludes, are almost all owing to this peculiarity. He requests a witness to speak out, or troubles him to repeat his statement; the witness gets irritated, and forthwith indites an epistle to a newspaper. The Times says: "There is not a judge upon the bench for whose personal character we feel a higher respect than for that of Mr. Justice Patteson, and no one, we believe, ever questioned his eminent qualifications for the situation he fills in point of legal knowledge." Can such a man be spared at the present time? Is the trifling inconvenience he may occasionally cause to witnesses or practitioners, capable of standing a moment's comparison with the loss we should sustain by his resignation in the prime of life and the fulness of his utility?

EVENTS OF THE QUARTER.

Mr. Justice Littledale has at length formally intimated an intention to resign, and simply retains his seat in the Queen's Bench till the appointment of his successor. The chief forensic question at the present moment therefore is, by whom his place s to be supplied, and what further changes the new promotion may draw after it. We regret to say, that this question is thought to turn almost exclusively on considerations of expediency. No one gives the Government credit for delaying their choice with a view to the selection of the individual best qualified for the bench, and the probabilities are currently calculated with reference to the effect of any given nomination upon the ministerial majority in the House of Commons. It would be useless to speculate on an event which will probably be decided before the appearance of this Number; and we are merely anxious to protest for the third or fourth time against the manner in which the administration of justice has been trifled with by the party now in power. It will be remembered, that the Equity Reform Bill of last year was thrown over for no better reason than because they could not agree amongst themselves as to the distribution of the patronage. One comfort is, that the disappointment said to be impending over sundry distinguished members of the bar who have the ill-luck to be in parliament, will inculcate a useful lesson. It will show that promotion may be checked as well as accelerated by standing contested elections for a ministry.

A very pretty quarrel, as Sir Lucius O'Trigger would say, has been got up in the pages of the *Times*, on the subject of Dr. Lushington's presenting himself to take part in the judicial consideration of a case in which he had been retained whilst a practising member of the bar. It seems that the dilemma has frequently occurred in the Equity Courts, and that the precedents are clearly in the learned civilian's favour. Then, were such precedents so opposed to principle as to deprive them of weight? or were there any peculiar circumstances which ought to have induced him to secede? We feel inclined to answer both questions in the negative. It may be difficult to make the public understand to what an extent the professional mode of viewing topics of a juridical kind excludes the notion of a fixed or lasting bias—how completely the impression passes from an advocate's mind when he has performed his part—how dependent on acknowledged rules, and varying with the arguments or evidence, are his opinions; but the majority of our readers must know this to be the fact, and we ourselves, without arrogating an extra degree of confidence for Dr. Lushington, have not the shadow of a doubt that he would have done his duty as an appeal judge with the strictest impartiality. At the same time, we see no particular objection to his absenting himself from a feeling of delicacy in the first instance, if this could have been done without attracting attention to the motive; but having once taken his seat upon that bench, he should have proceeded in entire disregard of hints, threats or insinuations of any sort. It is undeniable that the middle course pursued by him has a marked tendency to bring the judicial character into discredit.

We have received several letters on the subject of the Judges' Chambers, where,

it seems, a multiplicity of important matters are disposed of in a very unsatisfactory manner. The chief grounds of complaint are, that the judges pay little regard to precedent or consistency; and take no pains to check vexatious applications by giving costs. No matter how groundless the application, the costs are almost invariably made costs in the cause; so that a litigant who is on the safe side, or who never intends to pay anything, may harass an opponent with impunity. After trial, a party may be compelled to pay the costs on collateral issues, though he succeeds on the material one. Why should not the same principle be extended to interlocutory matters? When the point is really doubtful, we do not expect the judge to waste his time in such considerations; but when an application is obviously groundless and dismissed at a word, it should invariably be dismissed with costs. It has been suggested by persons of judgment and experience, that the three extra judges should form a practice court, to sit during the whole Term till three o'clock; that nisi prius sittings during Term should be abolished, and the more important part of the business now transacted at chambers be transferred to the Practice Court.

An ingenious pamphlet, entitled "Proposal for Establishing a Court of Arbitrament in the City of London," has been forwarded to us; and we hear that a distinguished member of the Upper House has thoughts of introducing a bill for establishing regular Courts of Arbitration. The plan is suggested by the foreign Courts of Reconciliation; but these, for reasons we formerly explained,[1] would never harmonize with the laws and customs of England.

We published in our last number a list of the notices regarding legal matters given for the present session. Mr. James Stewart calls for a commission to report on the expediency of consolidating the common law: Mr. Milnes, with laudable zeal for the church, proposes to modify the law of mortmain: Major Chetwynd will demand an inquiry into the whole administration of justice, particularly on the circuits: Sir Edward Sugden will introduce the question of Chancery Reform: Mr. Serjt. Talfourd will take the earliest opportunity of reviving his Copyright Bill: and Mr. Kelly will call the attention of the House to the subject of Secondary Punishment, and bring in a new Bill for Abolishing the Punishment of Death except in cases of treason and murder. Mr. Kelly's speeches were strong and clear expositions of the evils produced in many ways by undue severity; but it is our firm conviction that mankind are not yet sufficiently advanced to enable legislators to dispense with the only punishment, which, without being revolting from cruelty, comes armed with terrors to appal the most reckless of malefactors.[2] Neither can we admit the justness of Mr. Kelly's distinctions. Poisoning or stabbing with intent to murder, breaking open houses and assaulting with intent to murder, piracy with intent to murder, robbing and stabbing with intent to murder, setting fire to ships or dwelling houses with persons in them,—surely if the punishment of death be required at all, it is imperatively required for crimes of this order.

Sir George Rose has accepted the situation of a Master in Chancery, leaving (to borrow a *mot* which will easily be assigned to the right owner) only a *cross-remainder* in the Court of Review; which, it is to be presumed, will not last much longer even in name. Lord Brougham may then say of this, his *chef-d'œuvre* in legislature, as Grattan said of Irish independence, "Shortlived indeed! I sate by its cradle, I followed its hearse."

We understand that a Bill will certainly be brought forward in the course of the

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[1] 5 Law Mag. p. 35, *et seq.* [2] See an article on the subject, 11 Law Mag. 283.

Session to amend the Law regarding marriages within what are termed the prohibited degrees.

Speeches from the Throne have so often of late years held out empty threats or promises of legal alterations, that we lay little stress on the intimation regarding the administration of justice in the last. It is thought that Lord John Russell's measure regarding the trial of civil causes at Quarter Sessions will be revived in some shape.

Sir John Awdry retires from the Chief Justiceship of Bombay: Sir Henry Roper (the puisne judge of the Court) succeeds him; and Mr. Erskine Perry (favourably known to the English bar by his Reports) succeeds Sir Henry Roper.

Jan. 27, 1841.

Notices to Correspondents.—The Dictionary mentioned is generally considered to be the best. The plan suggested by A. R. will probably be adopted. We shall be glad of the information offered by a correspondent from Liverpool. A biographical article of some extent is postponed by an accident.

Erratum, p. 156. We are informed that the Christian Name of Sir William Bolland's father was James.

Erratum in the last Number. P. 340, line 7 from bottom, for "vol. ii. p. 87," read "vol. ii. p. 162, and vol. iii. p. 87."

LIST OF NEW PUBLICATIONS.

A Practical Treatise of the Laws relative to the Sale and Conveyances of Real Property; with an Appendix of Precedents, comprising Contracts, Conditions of Sale, Purchase and Disentailing Deeds, &c. By William Hughes, Esq. of Gray's Inn, Barrister at Law. In 2 Vols. 12mo. price 21*s.* boards.

(Ante, p. 94.)

The Police Guide, containing the Metropolitan and City of London Police Acts, and also the Acts 2 & 3 Vic. c. 71, and 3 & 4 Vic. c. 84, for the Regulation of the Police Courts in the Metropolis; with Notes of the Decisions which have occurred since the establishment of the Police Force. By Richard Charnock, Esq. of the Inner Temple, Barrister at Law. In 12mo. price 8*s.* cloth.

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Precedents in Conveyancing, adapted to the Present State of the Law. By Thomas George Western, Esq., F.R.A.S., of the Middle Temple. In 4 Vols. royal 8vo. price 3*l.* 12*s.* boards.

A Digest and Index, with a Chronological Table, of all the Statutes from Magna Charta to the End of this Last Session. By George Crabb, Esq., Barrister at Law. In 1 Vol. royal 8vo. price 2*l.* 2*s.* boards.

A Practical Treatise on the Law of Partnership; with an Appendix of Precedents, and a Supplement containing all the New Decisions to the Present Period. By Neil Gow, Esq., of Lincoln's Inn, Barrister at Law. Third Edition. 1 Vol. royal 8vo. price 23*s.* boards.

Statutes. 4to. 3 & 4 Victoria (15 p. 2), price 25*s.* boards.

Statutes. Demy 8vo. 1840, price 22*s.* boards.

New Commentaries on the Laws of England (partly founded on Blackstone). By Henry John Stephen, Serjeant at Law. Vol. I. price 22*s.* cloth boards.

[To be reviewed shortly.]

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THE LAW MAGAZINE.

ART. I.—COPYRIGHT IN SERMONS.

FOUR years have now elapsed since we entered into a discussion on the law of copyright. We were anxious on that occasion to explain the grounds upon which the Bill of Mr. Serjeant Talfourd deserves public support; and during the interval which has since elapsed, we have continually watched his exertions with the utmost interest.

We now return to the subject of copyright, for the purpose of discussing a question quite unconnected with the subject of the learned Serjeant's Bill. His object has been to increase the duration of the right from the period now fixed by law to a period of 60 years after the author's death. In our present inquiry we do not wish to express any opinion upon the advantage or disadvantage of adopting his proposals. We assume the general existence of a copyright for the period now fixed by law, and we proceed to inquire whether there is any sufficient reason, why the protection, which is extended to other classes of composition, should be denied to a sermon delivered from the pulpit.

The question has been suggested to us by those whom it touches closely. A practice has recently arisen of taking down in short hand the sermons of first-rate preachers, and of forthwith printing and publishing it for the pecuniary benefit of the person by whom the shorthand writer is employed. We are asked whether the preacher can check such a practice by any proceedings in the Courts of Law or Equity? In other words, whether such an act as we have mentioned amounts to an act of piracy?

In the first place let us remind our readers of the general terms of the law of copyright. "What says[1] the common law

[1] Law Mag. 19, p. 367.

of England? After a voluntary and general publication of an author's work by himself or by his authority, such author has a sole and perpetual property in that publication, so as to give him a right to confine every subsequent publication to himself and his assigns for ever. See Miller v. Taylor, 4 Bur. 2303. This was the opinion of three judges of the King's Bench, Lord Mansfield being one of the three, and Mr. Justice Yates dissentient. Again, in a subsequent case, Beckett v. Donaldson, where the same question was agitated, and which came by appeal before the House of Lords, it was held by seven of the judges, of which Blackstone was one, against four, that "the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law. But it was also holden by six of the judges against five that such common law right was taken away by the statute, 8 Anne, by which an author was precluded from every remedy except on the foundation of that statute and the terms and conditions prescribed thereby. This then being the state of the case by the common law, viz. that every author possessed the sole and perpetual property in the publication of his works, the statute 8 Anne, c. 19, limited that right to fourteen years, and, if the author was living at the expiration of that time, for fourteen years longer; which was altered by the 54 Geo. 3, c. 156, to twenty-eight years, and as much longer as the author should live."

Such is the law which now exists. Whether it is applicable to sermons, is the question to be determined. A few obiter dicta, which we shall presently mention, have assisted us in our inquiry; but we can find no decision by which the question is definitively settled. We have formed our opinion upon the general principles of the law, and upon the analogy which subsists between sermons and other literary productions; a course of reasoning to which the absence of positive authority obliges us to have recourse. "I am not aware," says Lord Stowell upon a subject in which there was the same want of authority, "I am[1] not aware of any case, which has occurred precisely similar to the present; it must therefore be decided not on express authority, but on principle or rules of analogy drawn from other authorities which are clear and undisputed."

[1] Parnell v. Parnell, 2 Hag. Cons. Rep. 170.

Our attention will in the first instance be directed to sermons which the preacher possesses in manuscript. He may preach his sermon from a manuscript in which it is set forth at length, or from notes so copious as to enable him to certify what he has preached; or he may have it taken down in shorthand during the time of delivery; or by the exactness of his memory he may himself shortly afterwards commit it to paper. In whichever of these modes the manuscript is made, the law and application of it appear to be the same: for the preacher has the power of fulfilling the two conditions upon which the privilege of copyright is granted: first, he can compare the original with any copy that is published, secondly, he can sell the sermon for his own pecuniary benefit. We shall afterwards discuss the law as it relates to sermons of which there is no manuscript or printed copy; as they have usually been termed mere oral sermons.

A man is said to be entitled to the copy of his own work, because[1] "it is the effect and produce of his own labour." "It is settled and admitted," said Mr. Justice Willes, "and is not now controverted, but that literary compositions in their original state, and the incorporeal right of the publication of them, are the private and exclusive property of the author, and that they may ever be retained so; and that, if they are ravished from him before publication, trover or trespass lies." "It is[2] certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man's work. Jure naturæ æquum est, neminem cum alterius detrimento et injuriâ fieri locupletionem."

Thus the foundation of the right is property, Next, as to the effect of publication. Subject to any acts of violence or claims of forfeiture, a man's property continues to be his own until he has agreed to part with it "by compact[3] or donation." "For to have the property of any thing, and to have the sole right of using and disposing of it, are the same thing." An author, who publishes, merely does the act by which his property is put into use. Mr. Justice Willes[4] observes, "To construe this only and necessary act to make the work useful and profitable, to be destructive at once of the author's confessed

[1] Millar v. Taylor, 4 Burr. 2341.
[2] Id. 2335.
[3] Id. 2338.
[4] Id. 2341.

original property against his express will, seems to be quite harsh and unreasonable: nor is it at all warranted by the arguments derived from those authors, who advance that by the law of nature property ends when corporeal possession ceases."

A purchaser of a work purchases the identical copy for which he pays his money. Of that copy he has the complete right utendi ac fruendi. That is to say,—he may read, destroy, or sell that copy. It does not however follow that he may print off other copies. The right to make other copies is no part of the bargain of purchase. In this respect the owner of a copyright resembles the owner of a patent, who sells a specimen of his invention without imparting to the purchaser a right to make imitations. The effect of publication may be explained upon the general principles, which are applicable to the construction of all contracts. What is it that the seller and purchaser have respectively contracted to sell and purchase? Is it only the identical copy which is sold, or that copy, together with the right of making an unlimited number of copies? The first it clearly is; but we can perceive no understanding in the contract, by which the second can be included, and we think that to confound these two purchasable subjects, the corporeal right, that is the right of possession of the book, and the incorporeal right, that is, the right of making copies of it, would betray inattention to those niceties and distinctions by which our law adapts itself to all the different modifications of the enjoyment and transfer of property.

The two main principles upon which copyright depends, are these: first, that it is originally a species of property: secondly, that it does not pass to other hands by the act of publication. There can be no doubt that a sermon, like a poem, a treatise, a history, or any other manuscript, is the fruit of a man's own labour; that, up to the time of delivery, it is his own property, and that until that time it is subject to his exclusive disposal. Thus there can be no doubt that the first of the two principles of copyright is applicable to a sermon. The difficulty of the question, such as it is, will be found to arise upon the second of these principles.

The delivery of a sermon from a pulpit amounts to a publication. The hearer listens for his own instruction, pleasure, and improvement. For the same objects he may reduce the

whole into writing; but it does not therefore follow, that he may print and publish it for his pecuniary benefit. We see nothing in the relation of the preacher to his congregation which can sanction such a step. His duty is to teach and to instruct; to point out religious duty, and to persuade his congregation to be zealous in discharge of it; but not to make them a present of an essay, which they may publish with a profit. The relation which subsists between the preacher and his hearers deserves to be well considered, as it explains the intention with which he preaches, and the understanding upon which they attend upon his ministry; in other words, the contract which exists between them, and the effect which upon a right construction of the contract is to be attributed to this kind of publication.

Let us look at the question in another light. If a man purchases a book, that is, the matter which is in print, and the type and paper in which it is contained, he has not obtained the copyright. The payment of the tithe and dues to the clergyman may perhaps be regarded as equivalent to a purchase of the matter of his sermon, though the analogy is somewhat far-fetched. But assuming the analogy to be correct, there still remains the question, why the parishioner, who, upon this assumption, is the purchaser of the matter preached, is to be regarded as having obtained more in his bargain than the common purchaser of a book, that is, of the matter, the print and the paper? If either of such purchasers could be supposed to have included the copyright in his bargain, it would rather be the latter; yet the law attributes to him no such right. When it formerly was argued, that publication amounted to a surrender of copyright, the true nature of the contract appears to have been overlooked. It was urged that the purchaser of a work might deal with it as he pleased, and that, amongst other things, he might make an unlimited number of copies. If the principle was correct, there would be an end to all distinction between limited and unlimited rights; a loan might be confounded with a gift, a mortgage with a sale, or any temporary bailment with an unreserved disposal of property.

We have already observed that, although we have no satisfactory authority upon the subject, we can produce some obiter dicta, which have assisted us in forming our opinion. Lord

Hardwicke speaks of objections to the publication of sermons after the author's death, "which," he says "the author may never intend should be published, but are collected from loose papers and brought out after his death."[1] Lord Eldon[2] refers more directly to the point. "On the other hand, if there be a lecture apparently oral, but which is nevertheless delivered by the assistance of a good memory from a written composition, the question will then be, if it could not be made out in point of law, that an oral lecture or an oral sermon was within the protection of the law, whether protection is due to the written composition." The following expressions of Lord Eldon in the same case are still more explicit. "I should[3] be very sorry, if I thought that any thing which has fallen from me should be considered to go the length of this,—that persons who attend lectures or sermons, and take notes, are to be at liberty to carry into print those notes for their own profit or for the profit of others. I have very little difficulty upon that point."

Lords Hardwicke and Eldon were lawyers of such high repute, that every word which fell from them deserves the utmost attention. Without treating these observations as by any means conclusive, we may at least say that they prove the idea of a copyright in sermons to have been familiar to the minds of both these learned persons; and we may infer that Lord Eldon had no idea that a delivery from the pulpit would amount to a sacrifice of copyright.

We now proceed to those cases which bear upon the subject before us by way of analogy. The two dicta which we last quoted are taken from the report of proceedings in equity upon the copyright of medical lectures. The name of the case is Abernethy v. Hutchinson. Unfortunately it is not contained in the Reports most commonly in use; but it is reported with precision and at great length in the Law Journal.[4]

As this case is one which at the time at which it was heard excited a great deal of interest and was regarded as a case of the first impression; and as it is peculiarly relevant to our subject, we make no apology for introducing an account of it at considerable length.

[1] Pope v. Curl, 2 Atk. 341.

[2] Abernethy v. Hutchinson, Law Journ. 3, p. 212.

[3] Ibid. p. 217.

[4] Vol. 3, 209; 1824 & 1825.

The plaintiff was the celebrated surgeon, Mr. Abernethy. On the 4th of October 1824 he commenced, at the theatre of St. Bartholomew's Hospital, a course of lectures upon the principles and practice of surgery. The course was to consist of thirty lectures, successively delivered on two evenings in every week. The persons who were to attend them paid a fee for the privilege of doing so, and signed their names in a book provided for the purpose. On the 9th day of October there appeared, in a publication called "The Lancet," the lecture which Mr. Abernethy had given on the 4th; and also a notice, that the lectures which he should give during the entire course would afterwards be published in the same manner. The defendant, Mr. Hutchinson, was the printer and publisher of the Lancet. With a view to prevent the continuance of this kind of publication, Mr. Abernethy commenced a suit in equity, and filed a bill in which he stated these circumstances; and alleged that the lectures were delivered by him from notes, which were his own property, composed by him, and never before published. He also stated that he had not authorized the publication by Mr. Hutchinson, but that he himself intended to print and publish the entire course. He added that lectures of the same nature had for a long time past been given by his predecessors in the same manner; that no publication of them had ever before been attempted by the persons who attended them; and also that, at the first lecture which was given after the publication of the 9th of October had taken place, he protested against it in the presence of his entire class, called upon the persons who took part in it to avow themselves, and offered to return the money which they paid for the privilege of attendance. He said that no person avowed himself. The prayer of his bill was for an account of the profits which the defendant, Mr. Hutchinson, had made by the publication, and for an injunction to prevent a similar publication from again taking place. Of the defence set up in the answer it is only necessary to observe two statements; one, that no stipulation had been ever entered into respecting the use to which the attendants upon the lectures should turn the knowledge which they acquired; the other, that the lectures were delivered extempore, and not from any papers or writings. When the case came on for discussion, Lord Eldon

seemed to think that there was not a sufficient proof that the lectures were delivered from a manuscript. A further affidavit was therefore made upon this point. Still Lord Eldon thought the proof in this respect defective. "I am compelled," he said, "to look at the present case as that of a lecture delivered orally." He thought that before an injunction could be granted, it must be ascertained in a Court of Law that copyright exists as to unwritten matter: but he gave leave to make the same motion again, on the ground of a breach of contract or trust. In consequence of this permission, "the bill was amended by the introduction of allegations that no persons had a right to attend the lectures except those who were admitted to that privilege by the lecturer; that it had always been understood by Mr. Abernethy, and by those who preceded him in the office and those who attended the lectures, that the persons who so attended did not acquire and were not to acquire any right of publishing the lectures which they heard; but that Mr. Abernethy and his predecessors respectively had and retained the sole and exclusive right of printing and publishing their respective lectures for his and their respective benefit." An allegation was added of the existence of an implied contract, and of the fact that one of the persons attending the lectures had supplied the defendant with copies of them. Upon reading this affidavit, Lord Eldon granted the injunction,—not upon the same principle upon which a manuscript copy is protected, but upon the principle that the publication amounted to a breach of confidence and a violation of contract. He said that "he had the satisfaction of knowing, and he did not possess that knowledge when this question was last considered, that this doctrine was not a novel one, and that this opinion was confirmed by that of some of the judges of the land. He was therefore clearly of opinion, that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling."

We have given this case at length, because until recently

the law respecting lectures was the same as the law respecting sermons. Lord Eldon, in the course of his judgment in this case, referred to other lectures; those, for instance, of Sir William Blackstone, at which it appears that he himself attended, and was accustomed to take notes; those also of Sir Robert Chambers, where the students used to take notes; "and so," he says, "with respect to any other lectures in the University, it was the duty of certain persons to give those lectures, but it never was understood that the lectures were capable of being published by any of the persons who heard them."

Copyright is secured to all lectures of this class by the 5 & 6 Will. IV. c. 65; whether sermons do or do not fall within the words of that statute, is a point quite open to discussion; but we are at any rate justified in applying to sermons any rules of law which were laid down with respect to lectures before that statute was passed.

The ultimate decison of Lord Eldon in Abernethy v. Hutchinson was quite independent of any question, whether the law recognised any property in a mere oral lecture. It turned exclusively upon the obligation which bound those who attended. A similar principle has prevailed with reference to secrets, which Courts of Equity seem to regard as a species of property, if they be property at all, for which they are unable to provide any adequate protection;[1] and yet they have issued injunctions[2] to restrain the publication of them, on the ground that they were obtained by a breach of trust or confidence.

Let us observe the analogy which subsists between the case of Mr. Abernethy and that of any eminent preacher. It has been said, in objection to the preacher's right, that he is obliged, as incumbent of his parish, to preach the sermon; and that, as he is paid for performance of the duty, his parishioners have in reality purchased the copyright. In like manner Mr. Abernethy, as lecturer of the hospital, was obliged to deliver his lectures; in the fee paid by his class, he had been paid for his lecture; still the lectures were the subject of injunction. There is also ground far saying, that the comparison

[1] Williams v. Williams, 3 Mer. 160; Newbery v. James, 2 Mer. 446.

[2] Govatt v. Winyard, 1 J. & W. 395. See Carter v. Goetze, 2 Keen, 583.

may be continued with advantage on the score of mutual understanding; for until the recent growth of the practice, to which we have alluded, it never was suggested that the clergyman was bound to give to the congregation, or that the congregation were entitled to derive from the clergyman, any pecuniary benefit in the Sunday's sermon.

Our clerical friends will not, we hope, be shocked, if we compare a sermon to another species of composition, very similar, so far as our discussion is concerned, however different it may be in other respects: we mean, a play. Respecting the piracy of a play, the law is well ascertained. Mr. Macklin was the author of a farce called "Love à la Mode," which was performed by his particular permission at certain theatres in the year 1760, but was never printed, nor published by any other means than performance. He appears to have been a jealous guardian of his literary offspring; for he was accustomed, as soon as the farce was over, to take away the copy from the prompter. The proprietors of the "Court Miscellany, or Gentleman and Lady's Magazine" employed a person to take down the farce from the mouths of the actors, published in one of their numbers the first act under the title of "The First Act of Love à la Mode," and gave notice that in the next number they would publish the second act. Mr. Macklin[1] then filed his bill against the proprietors of this work, praying in the usual terms for an account and an injunction. Lord Commissioner Smythe gave judgment upon the case without entertaining any kind of doubt. He remarked, "It has been argued to be a publication, by being acted, and therefore the printing is no injury to the plaintiff: but that is a mistake; for besides the advantage from the performance, the author has another means of profit from the printing and publishing; and there is as much reason that he should be protected in that right as any other author." These very words, mutatis mutandis, may be applied to the case of a sermon. It may be equally alleged, that, besides the advantage which the preacher derives from the delivery of a sermon in the pulpit, he possesses, as author, another source of profit in the right to print and publish: nor is there apparently any reason against the application to his case of the Lord Com-

[1] Macklin v. Richardson, Ambler, 695.

missioner's remaining observation, "there is as much reason that he should be protected in that right as any other author."

Another case, which may be put by way of analogy, is that which arises upon the sending of a letter. Whether the contents of a manuscript are communicated from the preacher to a member of his congregation by oral delivery, or by epistolary correspondence, can make no difference as to the fact of publication; except that the latter mode of publication appears to be a more complete disposal of the property than a mere oral delivery. Mr. Curl, a bookseller, assuming that the sending of a letter gave a property in it to the receiver, attempted upon this ground to justify his publication of the letters of Mr. Pope, Dean Swift, and other distinguished persons. Lord Hardwicke refused his assent to the argument. "I am of opinion," he said, "that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer."

We may certainly argue a fortiori that the member of the congregation, who hears the sermon, has no right to treat it as his own property. The case which occurred upon Lord Clarendon's manuscripts contains another illustration of the same principle.

Henry Earl of Clarendon was possessed of a manuscript work, which he gave to Mr. Gwynne, "that" (according to the words of the report)[1] "he might take a copy thereof and make use of the same as he should think fit, of which a copy was taken." It was observed by the court "that it was not to be presumed that Lord Clarendon, when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; Mr. Gwynne might make every use of it except that." The injunction was continued to the hearing. Looking to the decisions in the two last[2] cases, let us suppose that Lord Clarendon, instead of giving the manuscript to Mr. Gwynne, had read to him the contents of it,

[1] Duke of Queensbury v. Shebbeare, 2 Eden, 329.

[2] In the case of White v. Gerock, a dictum of Lord Tenderden contains a still stronger case. "I am of opinion," he says, "that the author does not lose his copyright by having first sold the composition in manuscript." 2 B. & A. 301.

and that the letter writer, instead of sending the letter to the person who received it, had in the same manner read the contents, can there be a doubt, that the person to whom the contents of the manuscript or of the letter were read, would be restrained from publishing them to the world? Yet this is the precise case of a clergyman who delivers from the pulpit the contents of a manuscript sermon.

The observations which we have offered are, we think, sufficient to show, that so far as sermons exist in manuscript according to any of the different modes which we have mentioned, they are entitled to a copyright. There is in the first instance the property in the composition, as originally completed by the author. Next there is a publication, which the dicta of Lord Hardwicke and Lord Eldon, and the analogy of other cases, alike forbid us to regard as the communication of the right to print and publish. There is also damage to the preacher in the loss of the opportunity of profitable publication. We may add, that there are fair grounds for arguing that a breach of confidence has been committed, though this point is likely to be disputed, and is one, which in a case of this kind it is not necessary to establish. Independently of this last point, there are, we think, sufficient grounds for relief in Courts of Law, as well as in Courts of Equity.

We now come to the second branch of the subject, that is, whether a sermon which is not delivered from a manuscript nor from copious notes, and which is neither taken down at the time of delivery by some person employed on behalf of the preacher, nor committed to writing by himself, while it is fresh in recollection; whether, in short, a sermon, of which the author possesses no written or printed copy, is entitled to the protection of copyright?

Where a sermon exists in notes or in a detailed manuscript, the copyright is claimed not for the words uttered by the preacher independently of the notes or manuscript, but for the words, as they appear in such a document. In the cases which we now propose to discuss, the preacher has made an oral delivery of his meaning and sentiments, but can produce no written evidence of what he has said; and if he were to institute proceedings upon the ground of piracy, he would be obliged to prove the identity of the sermon published

with the sermon preached, by the recollection of himself or of some of his congregation.

Lord Eldon states his doubts upon the subject in the following terms. "The first question is, whether an oral lecture is within the protection of the law? Now as far as my recollection goes, that has not yet been the subject of determination. On the other hand, if there be a lecture apparently oral, but which is nevertheless delivered by the assistance of a very good memory from a written composition, the question then will be, if it could not be made out in point of law that an oral lecture or an oral sermon was within the protection of the law, whether protection is due to the written composition? Another question will be, whether this court would interfere, before notice had been given that that apparently oral lecture was the delivery of matter from a written composition? And a farther question will be, whether, if the oral lecture is to be protected by the fact that it is in truth the delivery of a written composition, it does not lie on those, who insist that that circumstance gives the protection of the law to that which appears to be orally delivered, to produce and show that written composition in order to make out their case."

The statutes contain no protection at all for that which is merely oral. It is "to the author or authors of any *book* or *books*" that protection is secured by the statute of Anne,[1] and also by the statutes of 41 Geo. 3,[2] and 54 Geo. 3. If then there is any copyright at all in oral sermons, it exists by the common law. It exists too in a manner, which is the more remarkable, as it is more extensive than the copyright of works in print or manuscript; for the common law copyright was a a copyright in perpetuity. By statute it was neither created nor enlarged, but only restricted in respect of duration. So that if mere oral sermons are the subject of copyright, there will be this anomaly in the law: that compositions reduced into the tangible form of writing or print will be protected for a limited period, while compositions communicated orally will be protected for ever. Such could not be the intention of the legislature; we must inquire, whether it is the effect of their enactments.

There seem to us to be insuperable difficulties in the very

[1] 8 Anne, 19. [2] 41 Geo. 3, c. 107; 54 Geo. 3, c. 56.

commencement of this inquiry. We cannot discover any foundation for the existence of such a right. That on the one hand it can exist independent of property, or on the other, that there can be a property in ideas, doctrines, or sentiments, which are not reduced into print or writing, seem to be propositions quite at variance with all legal notions. The foundation of a patent right is analogous to the foundation of a copyright. A philosophical principle is not a fit subject for a patent. In order that it may become so, it must, in the first instance, be introduced into machinery. It must assume a specific form and become a tangible substance, from which the public may derive a benefit by practical use. In like manner the ideas, sentiments and doctrines expounded by a speaker, must be put into the tangible substance of a written or printed document, before they become fit objects for the strictly legal privilege of copyright.

This necessity becomes still more apparent, when we look to the course of proceeding which is adopted in the Courts of Law and Equity, with a view to the prevention of piracy. Declarations, which are used for this purpose at law, contain a statement of special damage accruing to the plaintiff from the publication which has taken place. The question then arises, how the preacher of a mere oral sermon or lecture could be damaged by such a publication? We do not mean, damaged in the way of misrepresentation, or by the publication of opinions which he desires to have it forgotten that he has ever maintained; but damaged in having been deprived of the profit of publication by the publication of the supposed pirate. The plaintiff in the action must not only allege special damage, but must also be prepared to prove that it has been sustained. For this purpose he must prove that he is in a condition himself to make the publication; which of course he cannot do, unless he shows that he possesses a manuscript or printed copy of his composition. So long then as the composition is merely oral, the plaintiff's declaration will fail, on the ground that he cannot prove the special damage. Generally speaking, the author's position in a Court of Equity will not be less unfavourable, for one step in the proceedings in that Court is to compare the publication complained of with the original composition. Of course this step cannot be taken, unless the author possesses some original copy.

Lord Eldon is explicit upon this subject. "I apprehend," he says, "when this Court is called on to enforce a legal right, by giving a remedy beyond that which the law gives, it is the bounden duty of this Court, be the case what it may, to see that the plaintiff produce his written composition; and therefore if this case be to be put at all on the right which Mr. Abernethy is supposed to derive from his having a full and correct copy, there must be an original, or a writing which contains all that has been published in this book; or he must have a writing, which is such in its nature as that coupled with what he orally delivered, it may be taken that he has substantially a written composition, as well as that which he delivered orally. When this Court is called on to give a remedy beyond the remedy which the law gives to persons who have a legal right, the Court must know what it is proceeding on; and if the case be put on this ground, either that there is a writing of one character or a writing of another character, that writing must be produced, so that the Court may know what it is doing. If that writing be not produced, I must then look at the motion as an application made to me merely on the ground of an oral publication; and then the question of property will arise, coupled, as it may be, with the doctrine of trust and with the doctrine of fraud."

The argument of Mr. Justice Yates, the dissentient judge in the Court of King's Bench upon the case of Millar v. Taylor, although it was overruled with respect to the copyright of a printed or written document, still appears to hold good in respect of an oral sermon. The component parts of a copyright are, first, the right to that which is to be copied; secondly, the right of making the copies. We are at a loss to discern where in the case of an oral sermon can be the first of these two rights; the right to the thing which is to be copied. We again inquire how mere ideas and sentiments and words can be termed property at all? How can such things be appropriated? There appear to be no means of appropriation, except those of writing or printing; by the adoption of either of which the sermon ceases to be a mere oral sermon.

"When," said Mr. Justice Yates,[2] "does this idea of an

Page 214. [2] Millar v. Taylor, 4 Burr. 25.

author's property attach? In other cases, as where the heir has a right to any species of property, it commences from his taking possession. An author is fully possessed of his ideas, when they arise in his mind: and therefore from the time those ideas occur to him, or from the time he writes them down, they are his property. Then if another man has the same ideas as another, he must not presume to publish them: he may be told those ideas were preoccupied, and thereby become private property."

We continue to quote the expressions of this learned judge, as he states with remarkable force the argument which, as applied to an oral sermon, appears to us to be unanswerable.

"It is a well-known and established maxim (which I apprehend holds as true now as it did 2000 years ago), that nothing can be an object of property which has not a corporeal substance.[1] There may be many different rights, and particular distinct interests in the same subject; and the several persons intitled to these rights may be said to have an interest in them: but the object of them all, the principal subject to which they relate, or in which they enjoy, must be corporeal. And this, I apprehend, is no arbitrary ill-founded position: but a position which arises from the necessary nature of all property. For property has some certain distinct and separate possession: the object of it therefore must be something visible. I am speaking now of the object to which all rights are confined. There must be something visible, which has bounds to define it. And that is the reason, why these great marks are laid down by all writers. It must be something that is visibly and distinctly enjoyed; that which is capable of all the rights and accidents and qualities incident to property; and this requires a substance to sustain them. But the property here claimed is all ideal; a set of ideas, which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. It was alleged for the plaintiff, 'that there are many other instances of incorporeal rights; such as all the various kinds of prescriptive rights and partial claims.' But the fallacy lies in the equivocal use of the word 'property,' which sometimes denotes the right of the person, as when we say 'such a one has this estate' or that piece of 'goods,'

[1] Millar v. Taylor, 4 Burr. 2361.

sometimes the object itself. Here the question is upon the object itself, not the person. I readily admit that the rights of persons may be incorporeal. But the question is, now, 'whether any thing can be the object of proprietary right, and which is not the object of corporeal substance.' And, for my own part, I know not of any one instance of any one right which has not respect to corporeal substance. Every prescriptive inheritance, every title whatever, has respect to the lands in which they are exercised. No right can exist without a substance to retain it, and to which it is confined; it would otherwise be a right without any existence."[1]

A single instance will render the argument quite intelligible. An easement over soil is in itself incapable of occupancy; but the soil can be occupied. In the same way it may be observed, that no *right* is tangible or capable of occupancy; but that the subject of the right, the road to which the toll is attached, or the soil on which the fair is held, is always something which may be seen and felt, and taken into substantial possession. On the other hand, the words of the speaker, his ideas and sentiments, cannot be reduced into possession, until, through the agency of the pen or the printing-press, they assume the character of tangible property.

Mr. Justice Yates alluded to one other topic, which requires our attention, although it ought, we think, to be used in a manner, very different from that in which it was employed by the learned judge. He spoke of the question, whether there was any supposed usage and law of the kingdom establishing a copyright. He denied that there was any law to such an effect, and added that there was no usage, of which the law could take notice. Perhaps with regard to sermons, the usage may be considered so far important, as it tends to show the understanding which subsists between the preacher and his hearers. Publication of sermons by the author of them is very frequent. Publication by a member of a congregation is quite a novel practice. In this respect there is a difference between a sermon and a speech at a public meeting; as the latter is much more frequently published by one of the audience than by the speaker himself. We do not mean to say that a speech at any public meeting cannot be made the

[1] Millar v. Taylor, 4 Burr. 2361, 2362.

subject of protection; but we think that if the speaker were to proceed in equity, he would be obliged to show that by some notice given before the publication took place, he removed the primâ facie presumption that according to the usual practice the hearers could be allowed, if they pleased, to publish the speech. In this way the breach of trust would be established, as it was in the case of Abernethy v. Hutchinson; and if in addition to this precaution, the speech were reduced to manuscript either previous to or at the time of delivery, on behalf of the speaker, the title to copyright would then be complete, and might be enforced by action at law as well as by suit in equity.

We may now allude to a class of sermons distinct from ordinary sermons, and, as we have been informed, peculiarly liable to piracy; that is, the sermons which are delivered not on a Sunday but on a week-day. Sermons of this kind are often given in a regular course, and are peculiarly valuable for the purpose of publication, as they relate to one particular subject, on which they contain a complete dissertation. Without straining the word "lecture," it may, we think, be construed to include this class of sermons. The fact that a composition is delivered in a church does not necessarily make it, in common parlance, a "sermon." Nor is any composition delivered upon a religious subject to be called a sermon and not a lecture. Were the composition delivered on the Sunday in the course of divine service denominated a lecture, an unusual meaning could be attributed to the word. But compositions delivered in a church, and after the reading of the liturgy upon a week-day, may, we believe, in perfect consistency with the ordinary use of the words, be called a course of lectures, as well as a course of sermons. If these remarks are correct, clergymen, who preach this kind of composition, may find a protection for their copyright in the statute enacted for the protection of the copyright of lectures.[1] By that act the copyright of lectures is secured to the author of them, and to his assignee; but the act does not apply unless a certain notice that the lectures are about to be given is delivered to certain justices, as directed by the act, nor "to any lecture or lectures delivered in any university or public school or col-

[1] 5 & 6 Will. 4, c. 65.

lege, or on any public foundation, or by any individual in virtue of or according to any gift, endowment or foundation." Upon the applicability of this act to this peculiar class of sermons or lectures, there has hitherto been no decision; but an argument may be fairly raised, that if they do not come within these exceptions, and if the notices required by the act are duly given, the preacher of lectures upon divinity, as well as a lecturer upon any other subject, comes within the words of the statute.

The legal doctrine, which we have been considering, may be summed up in the following terms.

For a sermon, which the preacher has composed, and of which he has a copy in print or in manuscript, there is a copyright under the statute of Anne; and under the two statutes of Geo. 3, the preacher may recover penalties or damages at law; or he may file his bill and obtain an account and an injunction in equity.

For a mere oral sermon there is no copyright, nor any protection by way of action at law. Nor is there any remedy in equity, except in a case comprising those two peculiar circumstances which were ingredients in the case of Abernethy v. Hutchinson; the one, that the publication complained of avowed itself to contain the words orally delivered; the other, that there is expressly or by implication a breach of contract. The former of these circumstances renders unnecessary the existence of an original, with which the copy may be compared: the other supersedes all consideration of a right of property, because the Court at once fastens itself upon the conscience of the publisher, and restrains him from violating his contract, without reference to the peculiar nature of the subject to which it relates.

Such is the state of the law upon the copyright of sermons. We believe that our readers will agree with us, that when the position which the clergy occupy, and the duties which they are required to perform, are attentively considered, the law must be regarded as wise and politic in securing to them this species of right. The clergy are a body of men drawn from all the higher classes of society, and educated at a vast sacrifice of time and money. They are scattered over the country in preferments very different in amount and character, and are

often obliged to maintain a position, to which their professional income is extremely inadequate. To the appeals of poverty they are subject, more than any other class of persons; and living, as they do, in constant intercourse with the poor, and entering into all their sympathies and sorrows, they can with difficulty obey the dictates of prudence in the regulation of their acts of benevolence. We may add that the principles of modern legislation, and the growing opinion of all classes of the community, no less than an increasing sense of duty amongst the clergy themselves, tends to render them more laborious in their holy vocation, and less capable of engaging in any other occupation for the increase of their yearly incomes. At the same time when we look round the different classes of society, we can hardly discover one, upon whom such an increase can be bestowed with so fair a probability of public advantage. A profitable copyright in sermons appears to be admirably fitted to the purpose. It meets the clergyman in his own special province. It serves as a motive for great mental exertion in the preparation of those lessons, which he is required to teach. It encourages him to search deeply into the doctrines of divinity, and to set forth the results of his investigation in eloquent and persuasive language: and it holds out additional rewards to be reaped in that one field of literature, which, while all others are closed to him by his numerous employments, he is both permitted and required to cultivate. However willing the clergy may be upon still higher motives to devote themselves assiduously to the preparation of their sermons, we think it but common justice that they should not be deprived of an additional stimulus in the enjoyment of a profitable copyright. Indeed it is not to themselves merely, and to their families, that the law is advantageous.

Were the delivery of a sermon to be construed as an abandonment of the copyright, a clergyman would be encouraged to content himself in the pulpit with a mere ephemeral production, and to reserve a composition of intrinsic and permanent merit for a more profitable mode of publication. The law affords a boon to the congregation by encouraging the clergyman to adopt a course directly contrary; and to address them with the richest fruits of his intellectual labours. It is also advantageous to the church herself, that her ministers have an additional inducement to accumulate fresh stores of

learning, and an opportunity of making such mental exertions as may qualify them for the discharge of her highest offices, without wandering from a diligent discharge of parochial duty.

There is one class of persons and one only, who will deem this copyright objectionable. We mean those who join the congregation, not with a view to religious improvement, but in furtherance of a lucrative speculation; who have no scruple in stealing from another man the price of his labours, nor in converting into a workshop of trade, a place which is consecrated to the holiest purposes. If in searching for examples of similar conduct we look to profane history, we are reminded of the military adventurers who preyed upon the rich harvest of the Roman agriculturist: when we turn to the page of Holy Writ, our attention is arrested by that memorable rebuke, "my house shall be called a house of prayer, but ye have made it a den of thieves."

Mr. Serjeant Talfourd, in one of his powerful appeals to the House of Commons in favour of his copyright bill, introduces the claims of the Scotch clergy in the following terms:—

"The University of St. Andrew's, after powerfully urging the claims of authors generally, thus submits the peculiar claims of their countrymen. 'Your petitioners venture to submit that in Scotland where the few rewards which used to be conferred on clergymen of literary and scientific merit have been withdrawn, and where the incomes of the professors in her universities have been allowed to suffer great diminution, those individuals have strong motives to solicit, and additional grounds to expect, that their literary rights be extended and rendered as beneficial as possible to themselves and their families.' Among those professors, and among the petitioners for this bill, is a clergyman unsurpassed in Christian eloquence, in reach of thought, in unwearied zeal, who has disregarded ease and intellectual delights prodigally to expend his energies on that which he regards as the sacred cause of the church and religion of his country, and who depends on his copyrights in such of the labours of his mind as he has committed to the press to make amends for a professional income far below his great intellectual claims. In addressing me on the subject of this bill, Dr. Chalmers says, 'my professional income has always been so scanty, that I should have been in great diffi-

culties, had it not been for the profits of my authorship; and I am not aware of a more desirable compensation for the meagre emolument of the offices I have held, than that these profits should be secured and perpetuated in favour of my descendants.' And who among us, not only of those who sympathize with his splendid exertions on behalf of the church of Scotland, but of all who feel grateful for the efforts, by which he has illustrated and defended our common faith, will not desire that wish to be fulfilled?"[1]

If we are wrong in the opinions which we have been supporting, the question will not be, whether that wish can be fulfilled, but whether the reverend divine may not be deprived of the profits of authorship, which, he tells us, have already proved so seasonable a resource. Because he selects his pulpit as the place which he shall adorn with the most finished production of his genius, and his congregation as the persons for whose instruction, delight and improvement it shall first be made public; for this reason, if a delivery from the pulpit is construed to be an abandonment of copyright, he is to forfeit the fair remuneration of his own intellectual toils. We feel sure that those of our readers, who have followed us thus far, will rejoice that such a loss cannot take place under sanction of any existing law. They will be glad that a clergyman may first employ his literary productions in the form of exhortation to his parishioners, and afterwards publish them to the christian world, as well for his own personal profit, as for the wider dissemination of the doctrines of the church. Whether the period of copyright ought to be extended or not, is no part of the question before us; but we should have thought an alteration in the law indispensably requisite, if eloquent divines were not permitted to derive from their works as large pecuniary advantages, as those which are secured to historians and poets, to philosophers and schoolmen.

[1] Serjeant Talfourd, Mirror of Parliament, 1839, vol. 1. p. 569.

C.

ART. II.—THE LAW OF COMPROMISE OR FAMILY ARRANGEMENTS.

THE doctrine of Compromise, which has been recognized both by the civil law and the law of Scotland,[1] forms a very important branch of the law of England, and embraces a class of cases which it is necessary to distinguish from those in which adverse rights have been the subject of judicial consideration. In the latter class, that which actually belonged to one party has been surrendered to another, while neither of the parties intended to give up his rights; in family arrangements, however, not only do the parties abstain from insisting upon their full legal rights, but they are supposed to be influenced by feelings which preclude such claims. Accordingly, it is only when a strong case has been made out that a Court of Equity will interfere with such arrangements, which, provided they are not tainted with any suspicion of fraud, ought to be protected with the most anxious care, on account of their obvious utility. In the Mauritius, for example, where it is doubtful whether the old French law or the code prevails, it is almost impossible to ascertain the strict law of succession. If the principle of family arrangements were impeached, a wide door to litigation would be thrown open. They render unnecessary the interference of the Privy Council in cases affecting claims in a foreign country, and which could not be satisfactorily settled in any Court of Law. It is not essential that there should be a scrupulously nice calculation of what each party

[1] Agreements of this kind are in the law of Scotland called *Transactions*, and both Lord Stair and Lord Bankton, two eminent institutional writers, think that they cannot be "ransacted" even by writings "newly recovered,"—"ex instrumentis noviter repertis." The former, after stating the doctrine of promutuum vel quasi mutuum, proceeds thus, "Positive law, for utility and quietness' sake, excepteth *transactions* which are properly such, and which are of two sorts, the one extrajudicial, when in any matter doubtful or debateable, either party, to share their hazard and trouble of a legal decision, is willing to *transact* and agree, so as thereby they may quit or abate part of what they claim as their right, and so they remove all future question, upon any appearing of right, either judicially or extrajudicially; and therefore what either quitteth to either of their rights is due for the same cause, and hath in it, either expressly or implicitly, that such transaction shall not be ransacted upon any thing that shall accidentally appear thereafter, fraud only, as the common exception in all human actions, being excepted."—Inst. of the Law of Scotland deduced from its Originals, tit. vii. s. 9.

might legally acquire, since the parties may be acting merely with a view to the preservation of amity and affection.

Such agreements are in their very nature so solemn that it is at all times difficult to rescind them; and if a compromise is to be questioned at all, no time ought to be lost in commencing the proper proceedings. This point was raised in the case of Yate v. Mosely,[1] where Lord Loughborough said, "that it was the business of the plaintiff, for the peace and tranquillity of the family, as well as out of regard to the prudence and conscience which regulate the proceedings of Courts of Justice, either sooner to have brought it forward in an adverse way, or to have had it amicably settled." Nor will a Court of Equity extend its discretionary aid to the enforcement of a contract unless the agreement is, in all its parts, certain, fair, and just. Even although it should be good in law, it does not follow that it should be carried into execution; many circumstances may, according to Lord Hardwicke,[2] operate to induce a Court of Equity to refuse its assistance.[3]

Our present object is to ascertain the leading principles of the doctrine which has not hitherto been fully illustrated, and, for this purpose, throwing aside all extraneous matter which may be mixed up with the cases, we shall state only those circumstances which may serve to elucidate the precise principle established in each. We shall endeavour to arrive at general results by a careful analysis of the particular cases. The links which form the chain of reasoning are to be found only in the Reports, and to these we shall refer in order that the members of the legal profession may not be ignorant of the sources from which useful information may be derived when called upon to advise concerning the adjustment of such differences.

The first material ingredient in such arrangements is, that they should be in themselves reasonable, and that they should rest upon sufficient consideration. This principle pervades all the cases of this description. One of the most prominent is that of Stapilton v. Stapilton; the facts of the case were these: by deed, Philip Stapilton was tenant of certain premises for ninety-nine years, if he so long lived, remainder to trustees to

[1] Vesey, v., p. 484. [2] Burton v. Luter, 2 Atk. 386.

[3] Vide note to the judgment of Sir T. Plumer in the case of Martin v. Mitchell, 2 Jac. & Walk. pp. 420, 428.

preserve contingent remainders to his first and other sons in tail male, remainder to his right heirs. He had two sons, Henry and Philip, who, by deeds of lease and release, reciting that for settling and perpetuating all manors, &c. in the name and blood of the Stapiltons, and for preventing disputes and controversies that might possibly arise between his sons, or any other person claiming an interest in all or any of the estates therein mentioned, released and confirmed, &c. Henry died, leaving issue, the plaintiff. The father, Philip, being also dead, the plaintiff, as son and heir of Henry, brought a bill to establish his title to the premises, &c.; the defendant, Philip, by his answer confessed the several deeds, but insisted that Henry was a bastard. Upon an issue directed, he was found to be illegitimate. The point in the argument was, whether, considering the doubt which existed in regard to Henry's legitimacy, the agreement had been entered into without valuable consideration having passed; and Lord Hardwicke thought that the plaintiff was entitled to a decree, inasmuch as the deeds were executed *to save the honour of the family.* That was a most *reasonable* agreement, which a Court of Equity would enforce; he alluded to the situation of the family at the time of making the agreement. Philip had considerable real estate; his two sons were then owned as being legitimate; their father and mother had lived together as husband and wife for many years, they lived as such at the time of the agreement. The parents seem to have anticipated the probability of a dispute between their two sons which would have the effect of throwing dishonour upon the family. The foundation of the agreement was the doubt as to Henry's legitimacy. Supposing the elder son proved to be illegitimate, the father must have known that, without such agreement, that son must have been left without any provision. If, on the other hand, his legitimacy was established, then the younger son would have had nothing. To prevent disputes, the father brought his two sons into an agreement to make a division of his real estate. Henry was subsequently found to be illegitimate, and his eldest son and heir insisted on having the benefit of the agreement. The question was, whether there was any *valuable consideration,* on all sides, for entering into

the agreement. In the case of Cann v. Cann,[1] it was laid down by Lord Macclesfield, that an agreement, entered into upon a *supposition* of a right or of a doubtful right, though it should subsequently turn out that the right was actually on the other side, would be binding. The compromise of a doubtful right was a sufficient foundation for an agreement. The chances were originally equal. The court would carry a *reasonable* agreement into execution, especially as the peace of a family would be thereby established.

The equivocal language of Lord Macclesfield did not escape the notice of Lord Eldon,[2] who admitted that in family arrangements, the Court of Chancery administered an equity which was not applied to agreements generally. He considered the case of Pullen v. Ready[3] a strong instance; there was another strong passage in the case of Cory v. Cory;[4] and keeping in view all the able reasoning in the case of Stapilton v. Stapilton, he was led to the opinion that in family arrangements the Court did not go the length of denying relief upon

[1] The case is reported by Peer Will. i. 723. Sir Robert Cann by his will devised the bulk of his estate to his lady for life, remainder to his *younger* son Thomas in tail, remainder over, and gave only an annuity to his eldest son on certain conditions. Upon the death of Sir Robert, his wife, being executrix, entered upon the estate and proved the will. Sir William, in his answer, insisted that there was a will of a later date. He brought a cross bill against his mother and younger brother for a discovery of the later will. The defendants denied all knowledge of or belief in the existence of any such will. Lady Cann exhibited another bill against Sir William to compel him to make his election, either to accept the annuity and release his title to the estate, or waive his legacy. The heir failed to shake the validity of the will. Lady Cann died. Sir William and Thomas, who had entered on the bulk of his father's estate, came to an agreement for concluding all matters in difference between them and establishing peace in the family. Sir William afterwards exhibited another bill, insisting that Lady Cann had burnt the latter will. Thomas pleaded the proceedings under the agreement. Sir William died; and, upon his son and heir bringing his bill of revivor, Lord Macclesfield could see no colour, there being no charge of fraud, for setting aside the release.

[2] Stockley v. Stockley, Ves. & Beames, i. p. 23. His lordship is reported to have doubted whether what in Stapilton v. Stapilton is represented to have fallen from Lord Macclesfield in the case of Cann v. Cann, could have been his language. His difficulty was, that there might be a *supposition* of right, without a doubt upon it; that it would be too much to execute an agreement entered into upon such supposition, if unfounded. He once thought that the words of Lord Macclesfield, instead of a "supposition of right," might have been "doubtful right;" but on looking into a MS. note which he had of the case, he found the words which were reported to have fallen from his lordship.

[3] Vide post, p. 285.

[4] Vide post, p. 280.

the principle which prevails among strangers. He thought the defendant Stockley bound under the circumstances; there was a fair question between the parties; the testator had been permitted to act upon the supposition that an agreement had taken place in regard to which he was to do something. There was enough before the parties to induce a doubt as to the legal operation of the will, and the actual intention of the testator. The compromise was of a nature to support the agreement.

It ought not to be overlooked here that the relinquishment of a suit, the ultimate success of which was involved in considerable doubt, has been held to be a good consideration, and sufficient to support a promise.[1] The same doctrine has been recognized in a Court of Equity. Lord Gifford, M. R., held, in the case of Attwood,[2] that if a person, after due deliberation, enters into an agreement for the purpose of compromising a claim made bonâ fide, to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of Equity would, without inquiring whether he was in truth liable to the claim, compel a specific performance. The defence of misrepresentation which had been set up by the defendant had not been substantiated. After deliberation and consultation a compromise had been concluded; such a compromise was a sufficient consideration both in law and equity for entering into an agreement. There was no foundation for any objection on the ground of want of consideration.

But while it seems to be an indispensable principle, that such agreements should be in themselves reasonable, and that a consideration should have passed between the parties, a Court of Equity will not take upon itself the task of estimating the adequacy or inadequacy of that consideration, provided the compromise has been fairly and deliberately made. This point has been established in the case of Naylor v. Winch,

[1] Longride and others v. Dorvill and another, Barnewell and Alders. ix. p. 117. Abbot, Chief Justice, said that the law of the case might truly be considered as doubtful; for there had been contrary decisions on the subject.

[2] Russell's Chancery Rep. i. pp. 353—359.

which has been very fully reported.[1] The only facts in that case which are necessary to our present purpose were these:— John Winch by his will bequeathed to the plaintiff an annuity of 600*l.* to commence six months after his decease, for her life, and the issue of her body begotten, on failure of which to revert, &c. He requested two friends to act as trustees, so that the annuity might be secured for the plaintiff's sole use and benefit. In 1808 the plaintiff, being then a widow, intermarried with Naylor, and in the marriage settlement, as well as in a prior indenture, it had been taken for granted that the plaintiff was entitled for life only. An arrangement was subsequently entered into between the trustees and the plaintiff, by which it was agreed that they should pay to her certain dividends for *her life*, to her sole and separate use, in satisfaction of the annuity. A bill having been subsequently filed by the plaintiff, praying to have it declared that she took an *absolute interest* in the annuity under the will of the testator, it was argued on her behalf that the deed of compromise, which had been entered into, proceeded upon a mistake as to the nature of her interest in the annuity, and consequently that she could not be bound by it; but, on the contrary, that the Court would relieve against a compromise entered into under a mistake as to the rights of the parties, who had taken upon themselves to declare what those rights respectively were. They had mistaken the nature of the plaintiff's interest; and upon that mistake all the subsequent deeds were founded. It was not necessary that there should be fraud or concealment in order to obtain relief against deeds entered into by parties who mistake their rights in the property affected by such deeds. It was obvious from the recitals in one of them that the plaintiff executed it under a mistake as to her rights. The same thing was established by the *inadequacy* of the consideration. On the other hand, it was argued that the doubts upon the construction of the will formed an adequate consideration for the compromise, there being neither fraud nor surprise in the case. In fact, the deed had been settled under the best legal advice, and with a view to the interest of all parties.

Sir John Leach said, that if a party, acting in ignorance of a plain and settled principle of law, should be induced to give

[1] Simon & Stuart, i. p. 555.

up a portion of his indisputable property to another under the name of compromise, a Court of Equity would relieve him against the effect of his mistake. But where a doubtful question arose, such as the question of construction upon the will of a testator, it was extremely reasonable that parties should terminate their differences by dividing the stake between them in such proportions as might be agreed upon. There was no evidence that the plaintiff had been fraudulently drawn into the deed. That there had been a consideration, too, was clear. There was the investment of money; there was the payment of the costs of a suit; there was a covenant for securing a certain sum per annum. When a compromise of a doubtful claim was entered into fairly, with due deliberation, and upon consideration, a Court of justice could not inquire into the supposed *adequacy* or *inadequacy* of the consideration. Where could there be found a scale for determining the true measure of adequacy? If a Court were, in such a case, to be governed by its judicial opinion of the rights of the parties, then, to him who, by that opinion, was held to be entitled to the whole property, no consideration could be really adequate which was less than the whole, and no compromise could ever bind the successful claimant. To support the deed of compromise it was enough that there was a doubtful question, and a compromise fairly and deliberately made *upon consideration.*

The same distinguished lawyer said, in the case of Harvey v. Cooke, that a transaction could not be held as a family arrangement, where the doubts existing as to the rights to be compromised had not been presented to the mind of the party interested, and who executed a release under a misrepresentation of fact which had been made to her, viz. that there was no question of compromise. If the case could have been treated as a family compromise of doubtful rights, it would have been extremely difficult to have maintained it; not because it would have proceeded on a mistaken notion of the rights of the parties—for *that* in a family arrangement was of no importance—but because there was not that *full disclosure* of the legal opinions communicated, and of the state of accounts, which the rules of a Court of Equity required.

The case of Groves v. Perkins[1] is illustrative of the same principle. In the year 1787 the plaintiff, William Groves, married Sarah Perkins, and in 1792 he deserted his wife. He was a man of low and irregular habits. In 1824 a sister of Mrs. Groves died intestate. James and Samuel Perkins, two of her brothers, took out administration to the intestate. Mrs. Groves' share of the property amounted to 3609*l.* It was arranged between Samuel Groves, on behalf of the plaintiff, and James and Samuel Perkins, on behalf of Mrs. Groves, that a weekly sum should be paid to the plaintiff, and that James and Samuel Perkins should procure a proper deed to be prepared for carrying the arrangement into effect. Accordingly, a draft was prepared by the solicitor of James Perkins. The plaintiff subsequently attended at the solicitor's office, where, the deed having been read over and explained to the parties, the plaintiff executed it. He had not, however, a professional adviser, nor *was he informed* of the amount of his wife's share of the property of the intestate. A bill was filed against the trustees of the deed by which the sum was secured, and against Mrs. Groves and her children, alleging, that it had been executed by the husband for a grossly inadequate consideration; that he was in distressed circumstances at the time; that he was ignorant of the amount of his wife's share of the intestate's property; and that his execution of it was procured through fraud and imposition. The bill prayed for a declaration to that effect, and that the deed might be delivered up to be cancelled. He relied on the language of Lord Eldon in the case of Cann v. Cann. Sir Edward Sugden, for the defendants, insisted that there was no evidence of concealment or misrepresentation on their part, or that the plaintiff was ignorant of his rights.

The Vice-Chancellor, Sir Launcelot Shadwell, said, that the plaintiff had deserted the defendant and her children, and never afterwards contributed to their support. Her conduct, since her separation, had been irreproachable. There was no evidence, however, in support of the allegation of fraud. The consideration, it was true, for which the deed had been executed was very small; and the question arose, whether, ad-

[1] Simons' Rep. vi. p. 576.

verting to the nature of the transaction, such *disclosure* had been made to the plaintiff as he was entitled to have. No statement had been made to him as to the amount of the property of the intestate, or his wife's share of it. The mere recital in the deed, that she died possessed of considerable personal estate, was not *a sufficient disclosure.* Although there was not fraud, the deed could not stand.

The same doctrine prevails in the law of Scotland. A widow[1] was entitled to a sum in name of jus relictæ, besides terce. Her husband executed a settlement, making very inferior provisions in her favour, and even these were to be forfeited in the event of a second marriage, which she made. After a lapse of ten years from the death of her first husband, during which time a series of actings by all parties had taken place on the footing that the settlement was unchallengeable, it was held competent to her to recur to her legal claim, in respect that any acts of alleged homologation were done *in ignorance* of her legal rights, and therefore afforded no proof of a consent to surrender them.

The Court was of opinion that in every such case, and especially where the sacrifice of valuable rights was involved, the true question was, whether these actings afforded clear, distinct, unequivocal evidence of consent to surrender these rights, and whether they otherwise did not admit of any reasonable explanation. The first thing to be ascertained in such a question was, whether the party knew what these legal rights were. The Court always looked with jealousy upon acts which were interpreted to the effect of implying that a party had voluntarily given rights away. The very basis of consent was removed if the party was ignorant of the nature and value of the rights which, it might be alleged, she consented to give away. There was moral evidence of the most convincing kind that the lady never would have surrendered her legal rights had she known what they were. Undoubtedly that would have been overcome if there had been clear proof that, in the *full knowledge* of her rights, she consented to part with them. Such evidence, however, was not to be

[1] Hope and others, raisers and claimers; Mrs. Dickson and Husband, claimants, Shaw and Dunlop's Rep. xii. pp. 228—230.

found in the facts of the case. The Court decided that Mrs. Dickson was not barred from claiming her legal provision.

The principle upon which these cases proceed is, that the parties to any such arrangement ought to be possessed of *equal knowledge*, so as to remove all grounds for suspecting that either the one or the other had been induced to accede to a proposed compromise under a misunderstanding of its true import.[1]

Akin to these cases, involving want of *equal* knowledge and presumption of an intention of fraud, may be classed the cases in which one of the parties to an arrangement has been in a state of intoxication at the time of its being completed by him. The point was brought under the notice of Lord Hardwicke.[2] The question was, whether the fact of one of the parties being drunk at the time of entering into an agreement was sufficient to set it aside. Lord Hardwicke thought that it was not, unless some unfair advantage had been taken, and there was no pretence for any such conjecture. He laid great weight on the fact of its having been an agreement to settle family disputes, as well as of its being a reasonable agreement. His illustration carried the principle a step further; for he said that if a son tenant in tail and a father tenant for life agree on something for the benefit of younger children, and the son afterwards complains of paternal authority having been exerted, although there might have been something of that sort, yet, if the agreement seemed reasonable, the Court would not set it aside.

But in the case of Dunnage v. White[3] there were other elements. A deed had been executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor. It appeared on the face of the deed that the parties did not understand their rights, or the nature of the transaction. The heir had surrendered an *unimpeachable title without consideration*. Evidence was given of his gross ignorance, habitual intoxication, liability to imposition,

[1] Vide the case of Hotchkis v. Dickson, which was heard on appeal from a decision of the Court of Session in Scotland, and may be found reported at great length in Bligh's Rep. ii. 303.

[2] Cory v. Cory, Ves. i. p. 19.

[3] Swanst. Rep. i. p. 151.

and want of professional advice. There was no allegation of direct fraud or undue influence. There had been an acquiescence, during five years, in the deed. Sir Thomas Plumer held that, in family arrangements, parties entitled in different events, might, while the uncertainty existed, each taking his chance, effect a valid compromise. In Stapilton v. Stapilton, the legitimacy of the eldest son was doubtful; that was a question proper to be settled; and the settlement of it was a consideration which gave effect to the deed. But considering the state of mind of one of the parties in the case before him, the circumstances of that party, and the nature of the transaction, he was of opinion that it was not such a deed as the Court ought to execute. The parties knew not what they were doing.

The general principle upon which a Court of Equity thinks itself entitled to interfere, so far as to give relief, is, the want of knowledge in one of the parties, who has been thereby actually drawn in to do something which would not have been done if all the circumstances had been known.[1] One of the earliest cases on this point (Pusey v. Desbouverie[2]) was free from any suspicion of fraud, although a young woman had, in consequence of her ignorance of the law, or of the custom of the city of London, been induced to believe that she was bound either to waive a legacy or to release a right by the custom. The cause, however, was ultimately settled by the parties out of Court.

It was held by Lord Harcourt, in the case of Broderick v. Broderick,[3] that either *suppressio veri* or *suggestio falsi* is a good reason for setting aside any release or conveyance; and, in illustration of his remark, he stated, that to recite in a deed that a will was duly executed, when it was not, is *suggestio falsi*, and to conceal from the heir that the will was not duly executed, is *suppressio veri*. There is another case reported,[4] in which Lord Eldon said that, in such contracts, full and complete communication of all material circumstances is what a Court of Equity must insist on. There was an agreement between two brothers, the younger of whom disputed the le-

[1] Ves. ii. 307; Hytton v. Biscoe, decided by Lord Hardwicke.
[2] Peer Will. iii. 315.
[3] Peer Will. Rep. i. 239.
[4] Swanst. Rep. iii. 463, Gordon v. Gordon.

gitimacy of the elder, for a division of the family estates. It was rescinded after a lapse of nineteen years, the legitimacy of the elder brother having been established on the trial of an issue directed. At the time of the agreement the younger brother had been apprized of a private ceremony of marriage having been celebrated by the parents, but had not *communicated* the fact to the elder.

In discussing questions of compromise a distinction has sometimes been taken between an error in law and an error in fact. Vinnius and others have held that a mistake either in point of law or of fact will vitiate a contract. Voet and Pothier, on the other hand, maintain that a mistake in point of law is not sufficient to set aside an agreement. There is a great difference of opinion among the Roman lawyers[1] as to the limits of the proposition, how far *ignorantia juris,* or *ignorantia facti,* will prevent the recovery of money paid under such mistake, and especially where ignorance has not been impressed upon the payer, as it were, by the person procuring it to be paid, or any other fraudulent interposition which would make it contrary to good conscience to retain it. The English Courts have, on this point, uniformly followed the safe rule. Let a man once be allowed to aver in defence that he did not know the law, and there will be no test left behind by which to ascertain whether he knows it or not; whether it is a defence set up in *bonâ fide* or in *pessima fide.* The knowledge of law which each individual possesses must, in that event, be first of all measured; then his capacity to apply the law to facts must be gauged; and to estimate the extent of both, it will be found necessary to consider how far he has been endowed with the *practicus habitus applicandi leges casibus obvenientibus,* the quality of mind which the civilians have pronounced to be the most valuable talent of a lawyer. The policy of the rule of law, that a party will not be allowed to say that he did not know the law, is the utter impossibility of ascertaining the truth or falsehood of the allegation, there being no means of knowing to what extent his knowledge,

[1] There was, for instance, much contrariety of opinion as to whether the doctrine relating to *indebiti solutio* was confined to cases where the *fact* was unknown or mistaken, or extended also to cases where the *law* was unknown or mistaken. Vide Wils. and Shaw's Appeal Cases, vol. v. pp. 445—454.

operating upon his own mind, actually went. But ignorance of *fact* is almost a necessary occurrence in many cases; and therefore, although the *law* may be presumed to be known, the *fact* cannot be presumed to be known.

This distinction, however, is much more easily laid down in general terms than followed out in particular cases. Admitting the rule to be a correct one, it is extremely difficult of application. A Court of Equity would, in many instances, find itself embarrassed in refusing relief against an error of law. Accordingly in the case of Lansdowne v. Lansdowne,[1] a question had arisen between the parties as to the right of succession. Having taken the advice of one Hughes, they ultimately executed conveyances of the shares fixed on for each. One of the parties sought relief against these instruments, alleging by his bill that he had been surprised and imposed upon by Hughes and the other party. Hughes admitted that, being himself mistaken, he had misled the plaintiff as to the person who was the heir at law. Afterwards the plaintiff voluntarily told him that "if his cousin William would, *he* would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and law suits." The decree was, that the instruments, having been obtained by a mistake and *misrepresentation* of the law, should be given up and cancelled.

In the case of Bingham v. Bingham, the plaintiff had bought and paid for an estate which actually belonged to himself.[2] The defence was, that the mistake originated with the plaintiff, to whom the title had been produced and who had time to consider it. Relief was granted, although there was not any allegation or insinuation of fraud.[3]

There is one point on which, among all their differences, the commentators are agreed, that ignorance of *foreign law* is to be considered ignorance of *fact*;[4] but it is not easy to detect any sound principle upon which so very general a proposition can rest. It does not fall within the scope of this essay to expose

[1] Jacob and Walker, ii. 205.

[2] 1 Vesey.

[3] The case of Cocking v. Pratt in Ves. sen. i. 400, is a mixed case of influence and *mistake*.

[4] We have heard Dr. Lushington in the House of Lords deny that foreign law was *matter of fact*, or that matter of fact, not disclosed, invalidated an agreement.

the fallacy which lurks beneath these vague expressions. If they have any meaning at all, it must be this. A cause usually consists of two parts, acts and instruments, which taken together constitute the *corpus* on which the Court must adjudicate, and the rules of law which are to be applied to the corpus facti. The rules are contained within the bosom of the Court; the facts have to be supplied and established by the parties themselves. Sometimes it happens that facts and circumstances require to be looked at, not with regard to the law of the Court which has to decide, but with reference to the laws and rules of another jurisdiction in another country. These rules form no portion of the *corpus facti;* they are merely *media* through which effect may be given to the rules of the Court, which rules can only be ascertained by evidence to be collected from the opinions of men skilled and learned in the law of that country. Foreign law is matter of fact *qua* the *Court which is to apply the rule;* but it is inaccurate to say that a rule of foreign law is a matter of fact in the common acceptation of these words. A rule, whether of the law of England or of a foreign country, is a sort of metaphysical being, a thing in the mind, not a matter of fact constituting a corpus facti on which the Court may adjudicate.

It has been long an acknowledged principle that fraud vitiates a deed *in toto,* although persons, in no manner privy to it, are beneficially interested under such deed;[1] and Sir Richard Pepper Arden is reported to have said, in the case of Gibbons v. Caunt[2], which arose out of a will, which must have occasioned disputes among the different branches of a family, that an agreement must be binding upon *all parties or none.* Supposing it to be proved and reasonable, a Court of Equity would not hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless it appears that they have acted with full knowledge of all the doubts and difficulties which arise.

In the case of Penn v. Lord Baltimore[3] a bill was filed for specific performance of certain articles of agreement. One part of the defence set up was that the defendant had been imposed on or surprised in entering into the agreement, and

[1] Bennet v. Wade, Dicken's Cases in Chancery, i. p. 85.
[2] Ves. iv. [3] Ves. i. 445.

another was, that, supposing there was no imposition or fraud, the defendant grossly mistook his rights. Lord Hardwicke was of opinion that neither imposition nor surprise had been proved, but still if there had been a plain mistake, he should not have decreed a specific performance. No ignorance, want of information, or mistake were to be presumed. The rights of the parties had been doubtful. It was therefore a proper case for an agreement, which, being fairly and without surprise entered into, ought not to be disturbed.

But a mistake which has been common to all the parties will not be fatal to an agreement.[1] This question arose upon the will of Edward Colston, who thereby devised in trust for Sarah Colston for her life with limitations to her sons and daughters in tail. He gave to his cousin Mary Edwards £500, to be paid to her daughters Sophia and Mary on their day of marriage &c., provided they married with the consent of their father and mother; and if they should marry *without* such consent, then such of the daughters so marrying &c. should have no more benefit by his will than if they were actually dead or not named therein. Mary Edwards had issue three daughters, Sarah, Mary, and Sophia. Sarah married John Pullen in the lifetime of the testator in a manner which he did not approve; Mary was married to Lord Middleton with such consent as the will required; Sophia married, *without consent,* Mr. Ready. A draft of articles for the settlement of family affairs was prepared and approved. Pullen and his wife subsequently objected, that Sophia, having married *without consent,* had forfeited her right to what should otherwise have gone to her. It was, however, held that at the time of the execution of the articles it could not but have been known that Mr. and Mrs. Ready married without consent. The parties could not be supposed to have been ignorant of that fact. It had been suggested that they might know the fact and yet not know the legal consequences; but parties entering into an agreement, with the very will out of which the forfeiture arises lying before them, must be supposed to be acquainted with consequences of *law* as to the particular point, and ought not to be relieved under a pretence of having been

[1] Pullen v. Ready, 1 Wils. 21.

surprised. The parties, with their eyes open, executed he deed. Nothing could be more mischievous than for a Court of Equity to decree a forfeiture, after an agreement, in which, if there was any mistake, *it was the mistake of all the parties* to the articles. No one of them was labouring under an impression more than another. The case was more nearly allied to that of Cann v. Cann[1] than any other.

The principles involved in this doctrine were very carefully weighed by Lord Cottenham,[2] in the cause of Stewart v. Stewart, which was heard in the House of Lords on appeal from a decision of the Court of Session in Scotland. The case was argued with much learning and ingenuity by Mr. Pemberton and Sir William Follett on the one side, and by Dr. Lushington and Mr. James Russell on the other. All the points to which we have adverted were raised in the course of the argument, and fully recognized by the present Lord Chancellor. The case was simply this:—Doubts being entertained as to the respective claims of the parties, counsel advised a judicial compromise, with a view to avoid litigation, the parties being mutually disposed to an amicable arrangement. Mrs. Stewart subsequently brought an action of reduction of that agreement, and one of the grounds upon which that action proceeded was, that she had been induced to enter into it in ignorance of her rights and claims, and in consequence of having been misled and erroneously informed in reference thereto by her agent, who acted for the other parties interested as well as on her behalf; but there was no averment that he had betrayed the one client to the other. It was found by an interlocutor of the Lord Ordinary that the pursuer had not established any ground for setting aside the agreement. The subject of the arrangement was complicated and difficult. The disputes, expensive at once and doubtful in their issue, which might possibly have arisen, would have been among persons closely united by relationship and friendship. It was thought wise, therefore, to abandon contingencies, and obtain peace by concession. The exact nature and extent of Mrs. Stewart's ignorance was uncertain; that she did not know the whole law of her case was probably true, as it was true of most parties; but the degree of her ignorance was by no means clear

[1] Vide ante. [2] June 3, 1839.

Her evidence of it consisted entirely of letters which passed between her and her agent; but then it was proved that she had personal interviews with him, and the points, upon which she alleged that she was in the dark, were points on which it was very improbable that no communication had taken place. Besides, in more than one of her letters expressions were used by her which suggested a belief that she must have had more distinct views of her true legal position than she was subsequently willing to admit.

Lord Cottenham took time to consider the case; and before giving judgment entered into a minute examination of all the facts. He thought it proved by various authorities and cases that the principle recognized by the law of England had been adopted in Scotland, although it had been seldom the subject of adjudication in the Northern part of the kingdom. He could see no good grounds for imputing improper motives to the common agent, who had acted fairly, honestly, and according to the best of his judgment in concluding the arrangement. The question between the parties had been considered doubtful by eminent Scottish lawyers. A compromise had been recommended. If, then, it should appear that a division of the property in question had taken place upon the principle of the chances of success being equal to both parties, there could not be a pretence for impeaching the arrangement. There had been a mistake upon a point of law only, and that not of foreign law, but of the law of Scotland. The parties were cognizant of the facts. The English authorities, although not all strictly consistent with one another, established one set of principles on this branch of law. Lord Cottenham took a rapid view of some of the cases which have been examined in the preceding pages, and sanctioned the conclusions which have been drawn from them.[1]

But it ought not to be forgotten, as we have already hinted,

[1] We ought, perhaps, to be ashamed to confess that we know not whether the case of Stewart v. Stewart has been reported. We have before us, however, a note of the argument taken in short-hand; and while we have thought it unnecessary to encumber our pages with the history of the cause, which would be interesting to nobody, or with the speeches of counsel, which, able though they may be, lose their interest when the occasion which called them forth has passed away, we pledge ourselves for the accuracy of the outline which we have given of the material points which were discussed.

that these family arrangements are in no circumstances easily overturned.[1] A Court of Equity leans strongly in support of them; and it is only with great reluctance that it can be brought to disturb them. In another case, which was heard in the House of Lords,[2] where it was attempted to reduce a decree of the Court of Session in Scotland, upon the ground of erroneous information having been communicated to one of the parties, and judgment having been pronounced with reference to matter which was founded in error, it was held that if a party has *not used due diligence,* but has trusted to the opinion of an agent rather than examine evidence for himself when it was within his power to do so, he could not subsequently be allowed to question the decision of the Court below.

Such is, we trust, an accurate and tolerably comprehensive though concise view of the Law of Compromise. The authorities of Text Books, Dicta, and Decisions can be gleaned only from an extensive field; but when collected, sifted, and arranged, they may, like all scientific knowledge, be comprehended within a very narrow compass. All conjecture and elaborate illustration have been intentionally avoided, as being foreign to our object and inconsistent with the nature of strict legal investigation.

[1] Vide language of Lord Brougham in the case of Clifton v. Cockburn, which is reported at great length in Mylne & Keen's Rep. ii, 78.

[2] Matthew Macallister, appellant, Flora Macallister, respondent, June 29, 1827.

ART. III.—SIR SAMUEL SHEPHERD.

Sir Samuel Shepherd was born in April 1760. His father was a goldsmith in London; a man of taste and acquirements, a poet much above mediocrity, the friend of Garrick and other wits of the time. He began early to form hopes of the future success of his son, and his anticipations were realized during his own life. He went often to the Courts of Law to gratify himself in witnessing his son engaged in a cause, and used to describe the pleasure he felt, "in seeing him," as he expressed it, "go alone a second time." The attachment of father and son was reciprocal. Sir Samuel always spoke of him with mingled veneration and affection, and delighted to his latest years, in recalling anecdotes of past events descriptive of his father's character.

A parent might indulge in sanguine hopes of a son whom he loved, from the natural bias of affection; but the master at whose school Shepherd was chiefly educated, a school of celebrity for many years at Chiswick, discerned, with less temptation to partiality, the seeds of future eminence. He always entertained and expressed the highest opinion of his pupil, and ventured to assure his father that whatever selection was made, "he would be an honour to his profession."

Mr. Shepherd was entered at the Inner Temple in July 1776, and not long afterwards became pupil to Mr. Serjeant Runnington, who married one of his sisters.

As a student of the law, he divided his time between legal studies and literary amusements. He was at all times a great frequenter of the theatre, where in his early days a finer style of comedy was required than satisfies a modern audience. As a boy he had frequently seen Garrick, and his youthful taste therefore was formed upon that unrivalled model.

The fascinations of dramatic representation have always presented a dangerous charm to young lawyers of taste and ingenuity; witness the many whose works, from the earliest times, have enriched the English stage. But though his imagination was engaged, and his leisure amused by this, the most rational of all dissipation, it did not mislead him from the regular path, or obscure the true objects of his professional

life. He felt a sober preference for legal success, to the more flattering but uncertain eminence of literature. The strong predominance of sense over genius, the happiest arrangement of the human faculties, preserved him from the perils of the muse.

He was an occasional speaker, like most of the men of that time distinguished in after-life, at the debating societies which were then held in different parts of London; where topics of public interest were discussed, and the elements of future greatness disclosed by many of the speakers. As an amusement, these imitations of debate are not unfitting to men of early talent, and as a lesson of practice for future business, they are probably of great use to many; perhaps to all who do not acquire in them a habit of vicious fluency.

Mr. Shepherd was called to the Bar in 1781, and two years after he married Miss White, the sister of an intimate friend and fellow-student, a lady of small fortune, of great sense, of taste, spirit and accomplishments. With her he passed his life in uninterrupted affection, and did not survive her many years. Upon his marriage he found it necessary to devote himself entirely to his profession. For the first two or three years his advancement was slow but gradual; it was not long, however, before good fortune or undeviating attention brought him into greater notice.

Two of his earliest arguments of any importance, for which he had made copious notes, were called on successively upon the same day. In the first he was much embarrassed; at the commencement of the second he fortunately dropped his papers, which became displaced and useless; this obliged him to trust to his memory, which did not fail him, for the cases previously collected; his eye was thus unshackled from that constant reference to notes, so often injurious to the effect of a good argument; and being thrown upon his own resources, his manner, naturally excellent, became more free and impressive, and he received a great compliment from Lord Mansfield at the conclusion of the argument. The Court, too, suspended the judgment they were about to pronounce against him, and which they afterwards pronounced upon further deliberation. From this time he came into full prac-

tice, as appears by the frequent recurrence of his name in the reports of that period.

Mr. Justice Buller, then a puisne judge in the King's Bench, who took an interest in the success of men of early promise, desired his acquaintance, and gave him very friendly advice. That judge used frequently during term, in the morning and while the Court was sitting, to invite several barristers to dine with him the same day; but he always broke up the party when the usual time for attending in chambers arrived. Sometimes whilst they were sitting after dinner, when the wine had been removed and coffee brought in, the doors of his dining-room would be thrown open, and he would hear any summons for which attorneys might be waiting without. The attorneys were ushered in as far as the limit of two pillars which divided the room into parts, and from thence addressed the judge.

This sort of social intercourse between the Bench and the Bar, springing out of business, could not exist now, from the difference of hours and the greater number of barristers. At that time there were but three rows of seats in the King's Bench, and they were rarely full.

One piece of advice which Mr. Justice Buller gave him, was not to persevere in the original intention he had formed, of practising at the Middlesex sessions, as it would necessarily interfere with a constant attendance in the King's Bench; the high road of the profession, as the judge called it—the surest road to eminence. The soundness of such advice must depend upon many circumstances; in this instance it was followed, and the result was prosperous.

Most practical lawyers have some one or two books to which they usually refer in the first instance, as a manual of practice. His favourite books of immediate reference were Buller's Nisi Prius and Crompton's Practice. The first, besides the advantage of its compendiousness, being of some authority in itself; the second, useful for its arrangement and selection of cases upon the practice of the Court. They have both been long superseded, the former by publications of great utility, one of the best of which is Mr. Selwyn's; and the latter by Tidd's Practice, a book of acknowledged excellence. The author of this last work, a man so well and so justly

esteemed in the profession, was a very early friend of Sir Samuel Shepherd. They were pupils to the same pleader, and always entertained a great regard and friendship for each other.

At this time, and long afterwards, the first name at the Bar was that of Erskine, a genius aptly fitted for his profession, upon which he reflected the lustre he derived. His manner was graceful, his pleasantry most winning, his topics bold, his selection of words felicitous to the highest degree, but his sagacity in the conduct of a cause surpassed his other qualities. He was some years senior to Shepherd, but a friendship soon sprung up between them, and they passed many long vacations together in travelling either in England or abroad. Their friendship was never interrupted, but their political views soon became widely dissimilar. For when the madness which raged in France, and affected the rest of Europe, began to divide men's opinions in England, they looked upon the aspect of affairs in colours the most opposed. Both were too amiable and just for this difference to diminish their mutual regard; yet Erskine could not but perceive that his friend, though a Whig of the old school, would never go "thoroughstitch" with the "Friends of the People;" and Shepherd perceived as clearly that the other was lending his brilliant talents to aims more dangerous than he dreamt of, and more extensive than he had calculated. It is surely surprising that such men as Mr. Fox and Lord Erskine, of refined understanding and the gentlest heart, should have been so caught in the spirit of those sanguinary times.

Lord Kenyon, who succeeded Lord Mansfield as chief justice, soon formed a high opinion of Mr. Shepherd's abilities, but was chiefly pleased with his clear and unaffected style of argument, and was used to say of him, "I like Shepherd, he has no rubbish in his head."

When he had been about twelve years at the Bar, some promotions to the rank of king's counsel were about being made, and Lord Kenyon, before the other appointments took place, desired to see Mr. Shepherd, and learn from himself, whether he also would like to take the rank, assuring him that if he wished it, no one in the Court of King's Bench should be made over his head; nay, offering to get the other

appointments delayed if he wished any reasonable time for deliberation. But being then in possession of great business as a junior counsel, and moderate in his views of ambition, he declined the flattering offer. Much of his business as a junior counsel would necessarily have left him upon taking rank, and he must have supplied it, if at all, by entering into direct competition with Bearcroft, Erskine, Bower, Law, and others of great name, older than himself and already established.

It was a few years after this that he began to feel the infirmity, which afterwards remained a constant pressure. He gradually became deaf, which not only diminished his capacity as an advocate, by diminishing the acuteness of one perception, but must always have appeared to himself a greater impediment than it really was; for it was supplied in a wonderful manner by the quickness of his other faculties. In much later times, when attorney-general and in the House of Commons, Lord Londonderry, the minister, used to say to him in jest, "that he believed he only shammed, for nothing of importance to the questions there ever escaped his attention." He however knew too well its fixed reality, which, during the greatest part of life, shut out those objects of legitimate ambition with which prosperous lawyers may fairly indulge their hopes, and compelled him at last to decline them, when freely offered to his hand.

In Easter term, 1796, he became a serjeant. He thought the infirmity which had begun to cloud the fairest prospects of success, might present less obstacles in the Court of Common Pleas, where the number of competitors was fewer, and the manner of conducting the business more quiet. He had also received intimations from Sir James Eyre, the chief justice of that court, that such an addition to the Common Pleas would be very agreeable to himself.

In the following Trinity term, he was promoted to the rank of king's serjeant. This promotion, so shortly after he had taken the coif, was very unusual; but the business which he immediately attracted upon joining the Court, his general reputation and acknowledged claim to a silk gown, had he remained in the King's Bench, justified the chancellor in conferring it.

If the desire of practising in a tranquil Court influenced him to join the serjeants, the calculation was made upon very uncertain premises. During the life of Eyre, and afterwards whilst Lord Eldon was chief of the Court, the usual regularity prevailed. But when Lord Alvanley (who having usually practised in equity, was new to the greater excitement of a common law court), came from the Rolls to the Common Pleas, irregularities crept into the manner of conducting the causes. He was a man of a rapid as well as a perspicuous understanding, and what he saw clearly himself, he perhaps expected others to see not only as clearly, but as quickly as he did. A judge has a right to expect much from his bar, but this is more than he should always look for. The natural desire of every intelligent mind to shorten business, unless it is duly restrained by a very calm temperament or an allowance for the dulness of others, is apt to perplex the very questions it seeks to elucidate. That the fleet may arrive safe in harbour, the fastest sailing vessel must limit its way to the slowest of the convoy. Where many are concerned, an allowance for dulness is perhaps requisite to the wholesome progress of business; for results may be very quickly discerned by an intelligent mind, which must be slowly evolved to the apprehension of others.

Some impatience on this head perhaps began the irregularities of the Court. From whatever causes they sprung, they continued after the death of Lord Alvanley and the promotion of Sir James Mansfield to the same office. This feverish mode of doing business, conducted as it was under two such judges of vigorous understanding as well as legal learning, was by no means injurious to Serjeant Shepherd; it gave a stimulus to his talents, and made exertion almost always necessary. Every cause being tried with excitement, and every point mooted with energy, he was forced into occasions for the display of powers, which threw his infirmity into the shade.

The chief leaders during that time were Serjeant Cockell, himself, Serjeants Lens, Best, and occasionally Vaughan. Lens was a man of extremely high character as a gentleman, a scholar, and a lawyer; sagacious and eloquent, but deficient in that flow of animal spirits which seems to be essential to popular success at the bar. Serjeant Best, the present Lord

Wynford, was Shepherd's chief opponent, a most adroit advocate, of great eloquence, with a voice toned for persuasion, of unbounded activity of thought, eager for his client, but naturally affable and kind.

The chief justice, Sir James Mansfield, was a lawyer of the old school, well grounded in principles, of great sagacity, with enlarged views, not ignorant of technicalities, but suffering them as little as possible to disturb the course of justice; his tendencies were rather to enlarge, than cramp the aspect of every question. He was advanced in age when he was appointed; therefore his physical powers of resisting pertinacity were not as they might have been at an earlier period.

Before his tribunal every power of eloquence, adroitness, legal knowledge, activity and force, possessed by the respective advocates, were in almost every cause brought into action. Under a judge, who so little repressed the turbulence, but knew so well the value, of each contending advocate, it may be imagined that the contest, though a sharp one, was in general fairly decided. In truth, his very clear judgment was little disturbed by such irregularity. The causes were kept up longer than in the King's Bench, but the great increase of business during his time, shows they were satisfactorily determined. Shepherd, as a man of correct understanding, might have shrunk in anticipation from such a conflict, yet it was singularly adapted to call forth on the sudden all his powers, and no man had them more readily at command. His best efforts were those provoked by the spur of the occasion, when the thought and expression bore the stamp of freshness. He had the ready money of promptitude, his currency came bright from the mint. This was the reason why he succeeded generally better in a reply than in an opening speech.

The opening of a cause, or of any public discussion, requires a previous collection of matter, a preconcerted arrangement of argument, a confidence amounting to vanity that begins with a professed intention to call upon the patience of the audience, to demand their attention to an elaborate statement, or to simulated flights of fancy, the result of previous meditation. And a capacity for this, artificial as it is, belongs perhaps to the loftiest branch of eloquence. But to reply with vigour and animation, caught from the heat and zeal of the debate,

to call up, on a sudden, answers to an opponent's arguments, to repel his wit, to retort his sarcasm, to turn by an adroit change of expression or of thought his artillery against himself—this, though requiring not so high a genius, is perhaps more captivating to the hearers; and though Shepherd's opening speeches were clear and persuasive, his strength lay in the reply. He was aware of it himself, and thought it more advantageous for an advocate, in the longest cause, to begin an immediate reply, than after an adjournment; which, if it gave time for deliberation, gave also time for the spirits to subside, and the animation of the contest to grow tame.

The Home Circuit was the one he had chosen at the commencement of his professional career, and he continued to attend it until he became solicitor-general. It is a matter of professional custom to discontinue the circuit upon being appointed to that office, and he of course followed the usual practice.

Besides Serjeant Best, his chief opponent upon the circuit was Sir William Garrow, a name of the highest distinction as an advocate. He was an extraordinary man, who for years was in the unshaken lead of the King's Bench and of the circuit, with a reputed deficiency of legal acquirements. But his capacity for conducting a cause, for catching the attention of a jury, for placing every subject in a point of view adapted to their feelings and understandings, and above all, his unrivalled power in the examination of a witness, more than supplied all the defects of legal learning. In truth, for the business of Nisi Prius but little learning is required. The questions are reduced to issues of fact, and the ultimate tribunal for the day, is an unlearned jury.

Shepherd and Garrow were always upon the most kind and friendly terms; they respected each other's talents, and their talents were different. Though the general powers of the former were applicable to the vigorous and searching examination of a fraudulent witness, yet he never attempted that artistical style for which Garrow became so famous. It was wonderful how Garrow, by a string of consecutive questions, each connected with the other like consequential propositions, conveyed to a jury, almost as clearly as in a speech, the argument or inference he wished to enforce. In this he was

unrivalled. But he was inferior to Shepherd on subjects of passion, in gravity of thought, in elevation of sentiment.

Jealousy amongst advocates (though points of contention, if not of rivalry, are of every day's occurrence) is extremely rare; between these it had never any existence. In the mind of Shepherd the fairest qualities were so admirably mixed, that the sentiment found no element to live in; and Garrow's appreciation of this, extinguished towards Shepherd, what a conscious superiority in his art forbade him to feel towards most others. It was a mutual satisfaction when they were engaged on the same side. And if during the time when they were afterwards attorney and solicitor-general together, Garrow threw too much of the public business upon his friend, it never disturbed their mutual regard.

In the year 1810 Shepherd was retained by Sir Francis Burdett in actions against the Speaker of the House of Commons and serjeant-at-arms, for trespass and false imprisonment, which were tried the following year. Sir Francis had written a libel upon the House; the House voted it a contempt and breach of privilege, and he was conveyed to the Tower under the authority of the Speaker's warrant. Some force was necessary to execute the warrant, for his house was barricaded, and a mob, friendly to Sir Francis, surrounded it. The military therefore were called out to assist, and one of the windows was forced. This was a cause of great importance, and also of great interest, and it gave Serjeant Shepherd much anxiety, not on account of its importance, for no man shrunk less from the responsibilities of duty, nor of course from its interest, for that is gratifying to every advocate; but from a full perception of the impossibility of ultimate success, or of finding even any favourable ground upon which to offer battle. Whatever might be the limit of parliamentary privilege, a libel by a member upon the House appeared to him an indisputable violation.

The question of unqualified privilege, of the right of deciding without appeal upon its extent, and imprisoning for every infraction, is one that opens a wide field of argument and illustration on either side. The possibility of abuse is unlimited in its range; the danger arising from the want of such a power, is almost as wide; and when every possibility or probability

has been discussed on both sides, the question remains as it did before the argument, entirely unsolved; like one of the few difficulties in metaphysics, incapable of human solution. But the world goes on tolerably well in the darkness of these; and the practice or enactments of the constitution must substitute rules to escape from the solution of the former.

The claim of arbitrary power, which a legislative body unquestionably arrogates when it at once defines and vindicates its privilege, opens a fair field for eloquence to oppose. But the question in Sir Francis Burdett's case was much narrower. It was simply this,—Is a libel upon the Commons a contempt for which they may imprison a member? All arguments against their unqualified claim are only fallacies as applied to this narrower question; they are beside it; they are fallacies of the "ignoratio elenchi," a favourite fallacy in public speaking. Serjeant Shepherd's understanding was too correct not to feel this difficulty, or to imagine for a moment that, however effective such an argument might be in popular debate, it could avail in a Court of justice.

One of the counsel associated with him was Mr. Holroyd, a very great name in Westminster Hall, as a lawyer equalled by few and surpassed by none, but without any popular eloquence. They were both fully impressed with the desire of Sir Francis to have the legal right submitted to the Court in the most distinct manner. This was effected by the mode of pleading adopted in both actions,—a demurrer to the Speaker's justification, and a replication of excess to that of the serjeant at arms. The demurrer was argued by Mr. Holroyd. It is one of the most learned and elaborate discussions to be found upon any subject in the books; but devoid of all but exact and logical interest. Political men of eminence who came into Court to hear, as they expected, a popular declamation, retired in disappointment from an argument so strict, so legal, so entirely addressed to the judges, and so unfeignedly calculated for one single object, the advantage of his client, that it had little charm for tastes cultivated principally in parliamentary debates.

The action against the serjeant at arms was led by Serjeant Shepherd. In addressing a jury something must be advanced ad captandum; and though the real question was whether the

warrant had been executed with unjustifiable force, by breaking the house, and calling in military assistance, yet he launched into the general question of the inconvenience and absurdities that might arise from an unqualified claim. One instance, however, which he presented to the jury, had strict application to the precise issue; could the officer of either House call upon the king's subjects to assist? because, unless he had such a right, he had none to call in the military. The case he instanced was this:

In the year 1697 Mr. Duncomb, a member of the House of Commons, was expelled and committed to custody on an accusation of attempting to forge endorsements on exchequer bills, and the Commons passed a bill of pains and penalties against him; but when the bill was sent to the Lords they threw it out, thereby acquitting the accused, and ordering him out of custody, sent their own officer to release him. On this the Commons directed their serjeant at arms to take him again. "Suppose these officers, acting under counter orders, had met at the door of the prison, and each had called on a bystander to aid in the execution of his process; if the subject were bound to act in aid of either of the conflicting authorities, he must fall a victim whatever part he took. He might then fairly say with the dying Mercutio, 'a plague o'both your houses.'"

Upon the death of Mr. Serjt. Cockel, Shepherd became king's ancient serjeant, and in June, 1812, was appointed solicitor-general to the Prince of Wales, then Prince Regent. This, though of no professional advantage, was personally extremely flattering, and he was justly much gratified by the appointment. It gave him an introduction to the Regent as one of his household as Prince of Wales, and the Regent, favourably disposed no less by general report than private representation, received him with more than usual courtesy.

During the life of that prince he received many indications of his good will and personal esteem. On only one occasion a passing cloud appeared for a moment. He had been sent for to a private interview on a matter of deep interest to the Prince Regent, and entertaining a strong opinion upon the subject, he was led to express it with an earnestness beyond the usual formality; the Regent looked surprised; but after a

moment's pause desired him to proceed; and when the audience was finished, he retired under the impression that he had given great offence. But being sent for shortly afterwards, he found the usual gracious reception; the Regent desired him to sit by him; and, interrupting the topic they were immediately discussing, and laying his hand upon Sir Samuel's knee, said to him with an air of great kindness, "Shepherd, you expressed your opinion very honestly the other day upon that question, and not many would have done as much."

He was appointed solicitor-general to the crown about Christmas, 1813, but as he was the senior king's serjeant, the highest rank then at the bar, it was necessary to alter the precedence, in order to place him below the attorney-general; for the two senior king's serjeants, called in the warrant "our ancientest serjeants," had from the reign of James the First precedence above all men at the bar. This alteration was made by a letter from the Regent to the Chancellor, under the sign manual. It was done with the full concurrence of Serjeant Lens, who was the next ancient serjeant, and had therefore an interest which might be affected by the change. The alteration was upon every ground a proper one; and it enabled the crown in future to have the assistance of the senior serjeants, without their leading the attorney-general. The attention of government had been called to this upon the occasion of Sir Vicary Gibbs, when attorney-general, going in to the Common Pleas to lead a cause in which Serjeant Cockel was also engaged, the serjeant having then notified to the attorney-general that he should assert his right of precedence.

He now entered into official life, having been upwards of thirty years in the profession. Though his views of ambition were moderate, and the common vanity of our nature was in him more chastened by sense, reflection, and simplicity of character, than in most men, he must have felt some exultation at finding the obstacle to public honours which one infirmity had seemed to cast in his way, removed at last; removed by no interference of private solicitation or friendship, by no political intrigue, but by the mere force of his character, the result of integrity and talent.

The way was no smooth one, for the clouds of future convulsion were then to be discerned in the distance, and

times of difficulty and turbulence occurred during great part of his official life. It was not, however, till the spring of 1817 that he became attorney-general, on the promotion of Sir William Garrow to the bench, and then began the difficulties. Perhaps there were few men whose general popularity could have made such times more easy to his position. From his liberal sentiments, the opponents of government felt security that the powers of his office would never be stretched to oppression; and his known attachment to the crown gave weight to his opinions when leaning towards moderation.

The trials of Watson, Thistlewood, Preston, and others, for high treason at the Spa Fields meeting, had been previously determined upon, but the difficult task of conducting these trials devolved upon him. The solicitor-general, Sir Robert Gifford, was a man with whom he could act on terms of the most confidential friendship, and rely for legal support with implicit trust. He was young for the appointment, but his future eminence fully justified the previous impressions which had caused it. He was a deep as well as a ready lawyer, a discerning and acute advocate, and, had he remained at the King's Bench bar, would have divided the lead with the celebrated man who now presides in the Exchequer. But he was induced upon taking office to practise in the Court of Chancery, that the Chancellor, as it was said, might have a law officer in his Court; an idle reason enough as it appears to us. The change was not favourable to Gifford. It is favourable to no man to leave his usual line where he excels, and divert his thoughts and habits of practice into a new course. Besides this, he was thus brought into competition with the first name that has for years adorned the Court of Chancery, Sir Samuel Romilly, then in the meridian of his fame and his powers. After a few years Sir Robert Gifford became Chief Justice of the Common Pleas, and subsequently Master of the Rolls, and a Peer. But he did not long enjoy his well deserved fortunes; for in the year 1826, to the great loss of his profession, and the sincere regret of his friends, he died at an early age.

Watson, and those charged as his co-conspirators, were arraigned at bar in the Court of King's Bench; they severed in their challenges, and Watson's trial alone occupied a week.

On this occasion the attorney-general received great assistance, not only in Court but in the previous preparation for the trial, from Mr. Gurney, now one of the Barons of the Exchequer. Mr. Gurney had been engaged either for the crown or the defendant in almost every state prosecution which occurred in his time, beginning with that of Hardy, Took, and Thelwall, where he was assistant counsel with Lord Erskine and Sir Vicary Gibbs. He undertook, to the great satisfaction of Shepherd, the examination of the chief witness for the crown, a man of the name of Castle, an accomplice who had turned king's evidence, and of an infamous character. This task required a union of judgment, skill and firmness, which no man could better supply, and was never more clearly shown than in this examination, which occupied eight hours, and in which only one question was objected to, and that objection was overruled.

Sir Samuel Shepherd, the attorney-general, opened the case with a clear and able exposition of the general law of treason, and its application to the particular facts; in the relation of which he confined himself, as was fitting on such an occasion, to a temperate and perspicuous narrative.

Sir Charles Wetherell, who was retained with Serjeant Copley for the prisoner, exhibited much research and learning in the legal discussion. His object was to show by an historical survey, that such a case had never been ranged under any species of treason; and when he entered upon the facts he displayed flashes of great genius. One expression produced a deep effect. The chief witness for the crown, Castle, upon his cross-examination by Sir Charles, appeared to be stained with almost every shade of vice and perfidiousness. Wetherell, after long dilating upon the law, and tracing distinctions between the vague and indefinite purposes of tumult and riot, and those which bear the specific character of treason, started suddenly with great animation into a review of the facts; and, after an allusion to Castle, finished a sentence with, "Gentlemen, will you suffer four human beings to be immolated upon the evidence of that" (here he paused for a word) "that *indescribable* villain!" The epithet appeared so applicable to the mixed infamy of the witness, that it struck upon the sympathies of all.

It was here that Lord Lyndhurst, then Serjeant Copley, increased his rising reputation, and became known to the nation as an advocate of the highest eminence. The speeches of Gifford, the solicitor-general, and Serjeant Copley, differed in character, as their different objects required. Copley's was full of general observations, of brilliant passages, of topics to work upon the prejudices or the feelings. It was a model of correct and classical eloquence. Gifford's general reply was a skilful, analytical, and impressive summary of the whole week's evidence, and won upon the attention as he proceeded. It was pronounced, and truly, by a great Whig leader of the Lords, "a hanging speech;" for it collected together with admirable precision the scattered parts of the evidence which bore relation to each other, and gave it a consistent shape, enough perhaps to have satisfied a jury upon a subject of less popular excitement, that the conclusions he drew were just ones. But Watson was acquitted; and that acquittal satisfied the government that, however much convinced they might be of the truth of the charge, proceedings against the others would be useless.

In the same year, after the acquittal of Watson and the others involved in that accusation, disturbances broke out in the midland counties, and acts of violence were committed by seditious mobs in Derbyshire. One man was shot by the conspirators, and a just alarm spread over the neighbourhood. There was no doubt that these outrages were treasonable, but it became a question of expediency whether to try the offenders for high treason, or for the minor crimes of murder, burglary, and riot, which were all involved in their acts. On this occasion Sir Samuel Shepherd displayed the firmness of his character. He and the solicitor general stood almost alone in opinion, that the proper course of proceeding was to indict the offenders for high treason. He was not shaken by the previous acquittals upon that accusation in London, from exercising a clear and unbiassed judgment, a judgment not rashly or obstinately formed, but after a deliberate view of the whole circumstances.

Upon a trial for the minor offences, a conviction would have been certain, but it might have created a notion that government dared not proceed upon the greater; and such a notion would indeed have been true, had government not so pro-

ceeded. An acquittal was perhaps less dangerous to the public peace, than the existence of such an impression. But he had other and better foundations for his opinion. In considering the depositions taken upon the occasion, and the nature of the evidence which could be adduced to substantiate the crime, he had opportunities of acquiring a knowledge of the general feeling of the people in that part of the country. He found that their confidence in government was unshaken, that the farmers, so far from entertaining any sympathy with this mad sedition, were many alarmed or incensed, but the greater part undisturbed, except by an increased vigilance to preserve their property from plunder; that an impartial jury might be fairly expected between the crown and the prisoners, and that if a clear case of treason were made out, the jury were not likely to be diverted from their duty by popular clamour or delusion. Under these circumstances the advice of himself and the solicitor general to government was clear and unhesitating. It was acted upon; and not only the result, which indeed is an unfair criterion of advice, but every step of the proceeding justified that which he gave.

Thirty five prisoners were arraigned at Derby before a special commission, consisting of Lord Chief Baron Richards, Mr. Justice Dallas, Mr. Justice Abbott and Mr. Justice Holroyd. The prisoners severed in their challenges; of the first four tried separately and convicted, three were executed. Of the rest, nineteen pleaded guilty and received various degrees of mitigated punishment; and twelve were let off altogether, the attorney general offering no evidence against them.

These trials occupied nine days and restored peace to that part of the country; the mode of conducting them gave universal satisfaction, the aspect of justice was unruffled by haste or harshness, and the law enforced with firmness and dignity. When the trials were all concluded, Lord Denman, then at the bar, who with Serjeant Cross had defended the prisoners, expressed himself as follows: "I think it may be proper for me to say from the part I have taken in these proceedings, that no man can wish more than I do that all which has fallen from my learned friend (Sir Samuel Shepherd) should have its due effect on the individuals he has so mercifully discharged; and I trust if any spirit of disaffection has per-

vaded the country, which has produced on their minds something like a perverted allegiance, it will be destroyed by seeing such a mode of administering the laws, and such a disposition to apply mercy when it can be properly applied."

Soon after his appointment as solicitor general, he was returned to parliament for the borough of Dorchester. He became a member of that assembly too late in life to afford a just measure of what his capacities for debate might have been; but he was very popular with both sides of the House, and always listened to with that attention which arises from a confidence in the honour and ability of the speaker. He opposed Sir Samuel Romilly's measure to abolish the forfeiture and attainder in cases of high treason; admitting the force of the popular topic, that in human tribunals it seemed hard to visit the parent's offence upon the son, yet supporting the existing law, "as fitted by that very argument to make the best affections of our nature operate as a check upon its worst passions."

The foreign enlistment bill was a measure which the government had then much at heart; but a strong opposition was feared, and particularly from the Whig lawyers. It was very satisfactory to Lord Castlereagh, who knew the pulse of the House to a beat, that this measure was brought in by Shepherd, whose legal reputation and popularity in the House might be the means of smoothing its way. It passed by a large majority, though contested in every stage. He also brought in a bill which abolished the wager of battle and the right of appeal in felony, remnants of a barbarous age, and was strongly supported by Lord Denman and Sir James Mackintosh, names ever foremost in national improvements.

The two offices of chief justice of the King's Bench and of the Common Pleas became vacant at the same time, in the long vacation of 1818, by the respective resignations of Lord Ellenborough and Sir Vicary Gibbs. They were offered successively to Sir Samuel Shepherd, but he declined them both. His appointment to one of them was much desired by the ministers, as they knew, if he accepted either, it would be under a full persuasion coupled with a just judgment of his competence to perform the duties; but he had made up his mind never to accept a judicial office involving the trial of prisoners.

After he had positively declined the King's Bench, it was proposed to him by Lord Liverpool, that the same objection did not apply to the Common Pleas, which as a Court had no criminal jurisdiction; and that a serjeant might be always appointed for the circuits, as upon the occasional absence of a judge from sickness. But this he felt would be practically altering the constitution of the Court, and must tend to create an impression of his incompetence for the civil duties. He was far from being insensible to the advantage of increased wealth, and the usual promotion to a peerage; but he felt a greater satisfaction in declining to risk a responsibility which he might not perhaps adequately fulfil, or at least up to his own notions of its extent. His conduct in this respect was characteristic of his mind, which always made the sense of duty the test of wisdom. He continued therefore attorney-general a few months longer, having from the time of his taking that office given up all private practice.

In the year 1819 the office of chief baron of the Exchequer in Scotland being vacant, his old and intimate friend, the Right Honourable William Adam, the lord chief commissioner of the Jury Court in Scotland, suggested that appointment, as one to which the above objections did not apply. The jurisdiction extended only to revenue causes, and they were never tried by a single judge, but by the full Court. It was an office of honour and ease, and he was much gratified by the suggestion. He had begun to feel the pressure of an official life, and the attendance at the House of Commons became irksome. The prospect of ease, so charming to all, to him was doubly so, because he saw no shadow of ennui in the vista. He was not like many men, who having passed a life in business, at last require it for an occupation; his mind was imbued with many principles of pleasure, wanting but opportunity of leisure to spring up and bring forth fruit. He quitted therefore the more distinguished office in England without regret, and felt no drawback to the change, but that of leaving his professional associates and the political friends with whom he had acted, but whose esteem he carried with him and continued to enjoy. His appointment was made in June 1819, and about the same time he was sworn in a privy councillor.

In Scotland he was received with very kind distinction,

which soon ripened into friendship between him and some of the most eminent men of the nation. In their society he found a charm congenial to his natural taste and feelings. A constant application at the bar is not very favourable to the cultivation of society; and though political associations bring a lawyer more within its engagements, yet if they are coupled with office, the increase of labour and anxiety scarcely allows him to enjoy it: but in Scotland he had neither labour or anxiety; the duties of his office were to his habits of business a trifle, and he felt therefore no anxiety to cloud the enjoyments of life. The very novelty of his position, surrounded as it were by strangers, so soon willing to welcome him as a friend, gave perhaps a fancied charm to the real pleasure of that engaging society; and some of his happiest hours were passed in Scotland.

He found there one who had been an early and constant friend, a member of the English bar, and of the home circuit, Mr. Adam, the lord chief commissioner of the Jury Court; and in his society many delightful hours were passed. Mr. Adam's estate lay in Kinross-shire, not far from Loch Leven, the lake so famous in history, as containing the island and castle where Queen Mary was confined; and if historical interest can be increased by fiction, made still more famous by the pen of Scott. At Blair Adam, the chief commissioner had instituted a club of a few intimate friends, who met there once a year in the summer, and remained together about four days. Amongst the members were Sir Walter Scott and Shepherd. The country round, within easy distances, is full of castles of antiquity and places of interest either in history or fiction; and it was part of their amusement during the time they were together to visit those places and explore. Much interest arose from noticing the manner or observations of Scott at some of these spots which he had mentioned in the novels, of which he had not then declared himself the author. Once in particular this occurred, when they were visiting a picturesque piece of scenery which lies within the grounds of Blair Adam. The spot is called the "Kiery Craigs," and is mentioned in the novel of "The Abbott," as being near the *howf* of the Kinross carrier. This place and name could only have been known to some intimate

friend of the family, in the habit of visiting at Blair Adam. At the first meeting of the club after the publication of "The Abbott," when the party was assembled on the top of the rock, Shepherd, looking Sir Walter in the face, and stamping his staff upon the ground, said, "Now, Sir Walter, I think we are upon the top of the Kiery Craigs." Scott preserved a profound silence, but there was a conscious look, and a change in the expression of his upper lip.

They visited Falkland palace at a subsequent time, after the publication of the "Fair Maid of Perth," and the disclosure of the *great* secret, and then the conversation was without reserve.

It was often at these meetings a source of gratification to Adam and Shepherd to recall old stories of their early days on the circuit; their circuit fooleries, as Fielding, the son of the novelist, used to call them, in which Sir William Grant, whom he also called the "Chevalier Grant," afterwards the distinguished Master of the Rolls, took a leading part.

To those who knew Shepherd well, the favourable impression he made in Scotland is not surprising. Perhaps few men were ever born with greater powers to conciliate the affections. His spirits in society were buoyant, but never oppressive; his capacity for entering into the feelings of others, for combining as it were with their tastes, was very great; his sympathies with elegance and propriety in every pursuit were strong. Politeness, as defined by "benevolence in trifles," was never better exemplified than in him. He had an exquisite sense of enjoyment in convivial wit and pleasantry; and envy, sometimes the curse of eminent talents, was a stranger to his nature. His kindness of heart was unbounded, and but for his great good sense and public reputation might have been mistaken for too much easiness;—as in that exquisite model of a virtuous man conceived by the genius of Fielding, in the character of Allworthy, in whom the worldly man "mistook the highest degree of goodness for the lowest degree of weakness." From even the possibility of such an error in *his* case, the moral force exemplified in his professional and official actions effectually preserved him; and he was never blind to the tendency of an action, though willing to attribute a bad one to the least unworthy motive. Though possessed of a most correct taste,

and keenly alive to the ridiculous, few were so forbearing in society to the rash and unsatisfactory discussions of very young men. He would combat the most violent or absurd propositions with the lively spirit and good humour of a boy; but when the argument became too prolonged for pleasure, he lay down the trumpet which he generally used, and took refuge in a long pinch of snuff; reminding one of the lines of Goldsmith on Sir Joshua when annoyed by injudicious critics,—

> "When they talked of their Raffaels, Corregios, and stuff,
> He shifted his trumpet, and only took snuff."

Such was his character in private life. From what particular faculty did his public powers arise? Not so much from one predominating quality, as from an admirable balance of many eminent talents. The soundness of his judgment was enlivened by a graceful and elegant fancy; his facilities of language and of humour corrected by a taste which never fell into exaggeration. He had a clear conception of his subject, which he conveyed as clearly to the minds of others. He could address the judges within the strictest rules of argument, or appeal to the jury with vivacity and eloquence. He was apt in the popular topics which prevail with a *common* jury, and in those still popular, but more refined, which influence the jury of a higher class. His manner too was admirable; easy, and graceful, and sincere; sometimes too energetic, but that seemed to spring from conviction. He never yielded a case whilst the slightest chance of success remained. But his powers were best displayed in that sort of causes where the result appears uncertain till the reply clears up the doubts. It was there that, by skilfully arranging the evidence, and illuminating it as he went on with just and pertinent observations, he led by degrees an assenting jury to adopt the conclusion he desired.

His understanding, though clear, was not cold; it received a tinge and elevation from the tone of moral sentiment which governed every thought; and whether in public or private, in seriousness or pleasantry, his simplicity was a constant charm.

In the year 1830 he was obliged by ill health to resign his office in Scotland, and was for several years subject to a painful illness. From this, however, he gradually but par-

tially recovered, and passed the last years of his life in Berkshire, in a house to which he was attached, partly from the beauty of the spot, and partly as having belonged to his family. The loss of sight nearly three years before his death greatly diminished the enjoyments of which his age was susceptible. By this affliction, the charms of the country were shut from him, and he was dependent upon another for the amusement of reading. But that which had governed his conduct in the struggle and business of life was at hand to console him in the weary hours of age,—a settled belief in the relation of man to the Creator as revealed in the Scriptures. His faith was not the blind adoption of opinions received in youth and retained without investigation, but the matured result of thought and serious inquiry. He made reason, which is God's "natural revelation," his guide in approaching the revelation of the gospel; his belief in which was a living principle of action: it made him forbearing to the faults of others, it opened his hand to the claims of charity, which never spoke in vain. Those who had been long about him, were attached by his amiable qualities, and felt a sense of regard which raised the common services of duty into officious and affectionate attentions. In November, 1840, he closed a life of honour and utility in the 81st year of his age.

ART. IV.—THE NEW LOCAL COURT BILL.

A Bill (as amended by the Committee) to improve the Practice and extend the Jurisdiction of County Courts. Prepared and brought in by Mr. Fox Maule, Sir George Grey, and Mr. Solicitor General. Ordered to be printed, 19th March, 1841.

Objections to the County Courts Bill now before Parliament. By Gilbert Abbott A'Beckett, Esq. of Gray's Inn, Barrister at Law. London: 1841.

THE opinions on the subject of Local Courts, which have been hitherto advocated in this Magazine, are, we suppose, already pretty well known to our readers; and as they already occupy a large space, we may be excused for not serving up a *rechauffee* of them here.

All the plans for establishing low local tribunals, proposed during the last fourteen or fifteen years, having signally failed, and been admitted, after full consideration, to be likely to inflict incalculable mischief on the community, we shall confine ourselves in this paper to examining the demerits of the present measure, and to showing that, bad as was the genius of our legislators for legal reform in preceding years, it seems to be becoming, in this fourth year of the reign of our sovereign Lady the Queen, "bad by degrees and beautifully worse." We regret that the task is an easy one—regret, we say, for it gives us pain to reflect that persons could be found in high official situations, possessing so thorough a contempt for the common sense of the members of both Houses of Parliament, as to submit such a measure as this to their consideration.

When a government intend to make alterations in any institution of the state, the person who proposes the alterations to the legislature is usually the minister to whose department they relate, or some other personage, who from his situation must be supposed to have a slight acquaintance with the subject, and whose responsibility and character would form some guarantee to parliament and the public against impertinent and ignorant quackery. Lord Morpeth proposes the Irish Registration Bill, Mr. Labouchere the modification in the colonial tariffs, and Mr. Baring an increase of the window tax. Whom then should we expect to find proposing an important alteration in the administration of the common law and the partial abolition of trial by jury? Should it not be, if not the Lord Chancellor, at least the great law officers of the crown—the attorney and solicitor general? Could we by any possibility anticipate that such a measure would emanate from Mr. Fox Maule? Is not this very circumstance alone sufficient to excite the suspicion and indignation of the legislature? Why should they be asked to consider Mr. Fox Maule's proposed reforms of the law of England? If the government had a measure of reform on the subject prepared with any care—prepared in a manner that the attorney and solicitor general would not be ashamed of it—why not submit it to parliament under the sanction and responsibility of those officers? Why throw it on the general scapegoat?

It will be said that it was introduced under the responsi-

bility of Mr. Solicitor General; but his name appearing on the back of the bill is a mere matter of form and accident. He was probably in the House when Mr. Fox Maule was asked by the Speaker who would bring in the bill with him, and was named on the instant by the latter gentleman in the ordinary way and on the ordinary understanding. However, the fact of Mr. Fox Maule and Sir G. Grey preceding him, is enough to remove all doubt on this point.

When we consider Mr. Fox Maule's pretension to the character of a law reformer, we are thoroughly amazed at his presumption. Lord Brougham, who was a host in himself, who was the very personification of reform, who had risen to fame as a barrister and was then Lord Chancellor, whose measure was well matured and the result of long practice and experience, and was supported by men of high reputation, failed ridiculously in his attempt to impose it on the country. But the task to which Lord Brougham was unequal is of course mere child's play to Mr. Fox Maule, a gentleman who is known only as under secretary of state for the Home Department,—who is neither a barrister nor a solicitor, nor even a pretender to an acquaintance with the laws of this country,—whose measure is the obvious result of a profound and extensive ignorance of the system with which it meddles,—is unsupported by any one man of weight with the public or the profession, and is especially eschewed by the common law officers of the crown, as if they were satisfied that a connexion with it would be sufficient to ruin their reputations. Were he the mere organ, through whom a measure founded on the reports of committees or commissioners was presented to the legislature, he would be merely discharging a function for which we admit he has some qualifications. But the measure is his own production, or the production of some genius as sapient as himself. With the characteristic absence of moral fear which distinguishes his leader in the Commons, he sets at defiance the recommendations of commissioners, the results of inquiries, the dictates of common sense. The common law commissioners recommend short forms of pleading; Mr. Fox Maule dispenses with all forms of pleading. They recommend that respectable professional men should be encouraged to practise in the new courts; Mr. Fox Maule encourages only the veriest

scamps. They—but we shall go through his absurdities more in detail—they are positively almost incredible.

The common law commissioners estimate the number of cases, annually decided in the Courts of Requests and of Conscience, at no less than 400,000.[1] These courts Mr. Fox Maule proposes to abolish (clause 33), and to give the officers compensation, unless they shall be appointed to like offices under his bill (clause 34). The number of County Court judges he proposes to appoint for all England and Wales is only twenty-five (clause 1). If we divide the 400,000 cases between these, we shall find that each of them will have 16,000 a year to dispose of; 53 a day, supposing that he sits on 300 out of the 365 days, and more than eight an hour, supposing that, like the judges at Westminster Hall, he sits from 10 till 4. This, however, Mr. Fox Maule does not consider occupation enough for them; and therefore proposes to make them the sole judges, (unless the plaintiffs should be willing to pay all costs for resorting to any other tribunal,) of all personal actions and actions of ejectment and replevin between landlord and tenant, where the debt, damage, or rent does not exceed 20*l.* Our readers are aware, though most probably Mr. Fox Maule is not, that in Ireland there has been in existence, for some years, a system of Local Courts, somewhat similar to those which he now proposes to establish. In these courts, with a jurisdiction of 20*l.* on bonds, bills, and promissory notes—10*l.* in debt, assumpsit, and account—5*l.* in trespass, trover, *quantum meruit* and detinue—and 20*l.* rent in cases of ejectment between landlord and tenant, and relieved besides of all disputes between master and servant, &c. &c., over which the Courts of Petty Sessions had jurisdiction up to the amount of 5*l.*—the number of cases in a single year was 614,500.[2] If we consider that the population of England and Wales is once and a half that of Ireland, that the former have at least twenty times more wealth and sources of litigation, and that the jurisdiction given by Mr. F. Maule's bill, supposing that the other circumstances of the two countries were equal, would afford double the number of cases allowed under the Irish system, we shall form a tolerable estimate of the number of cases that will be brought into the County

[1] Mr. A' Beckett's pamphlet, p. 17. [2] Id. p. 9.

Courts annually, by multiplying 614,500 by 21½, and adding 400,000 to the product. But if we take the lowest possible estimate, and suppose that the cases under this bill will be only three times as many as those in Ireland, we shall find the amount to be 1,842,000. If we add to these the 400,000 from the Courts of Requests and Conscience, and divide the whole by twenty-five, we shall find that each of the new county judges will have 89,680 cases to dispose of annually, 298 daily, and 49 and a fraction hourly. Not only is he to decide all these, but also to inquire in every case into the defeated party's wealth or poverty, and ascertain by what instalments it would be convenient for him to pay. As if even this were not enough, Mr. Fox Maule has introduced one or two other bills for transferring to them all the country insolvency and bankruptcy business.

The public have a right to expect that any one, who comes forward to propose a great change in the ancient institutions of the country, should know something of the subject, should have devoted some attention to it, should be acquainted with the working of the system which he purposes to alter, should have endeavoured to find out whether there was anything better in operation in any part of the kingdom, and that the measure brought forward for their acceptance is superior to and free from the defects of every other hitherto known among them. This, we imagine, is not too severe a test; but how will Mr. F. Maule's bill stand it? The system, which it proposes to erect, is not only so very like, in many particulars, the system of Local Courts which have been in existence for nearly half a century in Ireland, but is so carefully provided with all the means for mischief which wit and experience discovered in the latter, and which have been in a great measure removed by successive enactments, that we cannot refrain from laying a short sketch of it before our readers.

By 2 Geo. I. c. 11, s. 1, the judges of assize were empowered to hear and determine in a summary way, by "civil bill," all disputes and differences between party and party, for any sum not exceeding 10*l.* in debt, *assumpsit* and *insimul computasset*, and 5*l.* in trespass, trover, quantum meruit and detinue for goods and chattels taken or detained. By 1 Geo. II. c. 14, s. 1, this summary jurisdiction was extended to 20*l.* on

bills, bonds, and promissory notes. Under these statutes the plaintiff served the defendant with a summons or "civil bill," briefly stating the cause of action; the parties without further pleading met before the judge of assize, and "proved and fended;" the judge decided summarily, and ordered execution to issue unless either party appealed, which should be to the next going judge of assize. So things went on for many years. At length this species of business became so great that it interfered with the regular business of the assizes, and the judges were frequently detained through all the long vacation endeavouring to get through it. This was considered so serious an evil, that on barristers being appointed in 1795 in consequence of the disturbed state of the country, to assist the magistrates at quarter sessions, it was thought proper to transfer to them the "civil bill" jurisdiction of the judges of assize. For the purpose of still further facilitating the administration of justice, each county was divided into two or more districts, for each of which Quarter Session and civil Bill Courts are regularly held at the same periods of the year, which are so combined in practice that the criminal business is disposed of in the intervals of the civil business, or on one or more days set apart for it in the middle of the period fixed for civil bills. The only difference between this and the former system is, that under the former a fee of 10*s.* 6*d.* was allowed to counsel, but as Irish counsel did not go to sessions, this fee was struck off from the new scale of costs, which were at first 7*s.* 6*d.*, but by a change introduced in 1836 are reduced to 6*s.* including fees for filling the summons, serving it, filing it with clerk of the court (who is the clerk or deputy clerk of the peace), conducting the case in court, and obtaining a writ of execution. The different items may not be unamusing:

	s.	*d.*
To an Attorney for filling summons	0	6
To a Bailiff for serving it	0	6
To the Clerk for entering it	0	3
To do. for signing decree or dismiss . . .	0	3
To an Attorney for conducting the case . . .	2	6
To do. for drawing and signing decree or dismiss .	1	0
To the Judge for signing the decree	1	0
	6	0

The assistant barrister, as he is called, decides all questions of law and fact, but if he see any great difficulty in settling a question of conflicting evidence, he selects a jury of three from the bystanders. If either party be dissatisfied with his decision, he appeals to the next going judge of assize, not specifying his grounds of appeal, but merely stating that he has reasons for believing the decision erroneous. Before the judge of assize the whole case is gone into anew, as if it had never been heard, and from his decision there is no further appeal. The costs allowed on appeal are only 10*s.* 6*d.* There are no costs allowed for witnesses on the original hearing or on the appeal, or for any purpose but what we have set forth in the analysis of the 6*s.* In cases of ejectment and replevin, where the amount in dispute is above 20*l.*, attornies are now allowed a guinea for conducting each case, and the general scale of costs is different from that fixed for other cases. These courts have no exclusive jurisdiction. Parties may bring their actions in the superior courts for cases within the jurisdiction of the Civil Bill Courts, and will get their costs in the ordinary way, unless the judge shall certify against them at the trial.

Here was a system by which Mr. Fox Maule might have profited if he were aware of its existence—a system which has been undergoing improvement for the last forty-five years, and is now raised to as high a state of perfection as it is possible for such a system to attain. Perhaps he heard of its existence but disdained to be a copyist and resolved to have something of his own peculiarly original. Let us compare it for a moment with his ingenious inventions.

The Irish Civil Bill Courts interfered with no other courts; the only change they effected was in giving the chairman of quarter sessions a civil jurisdiction in certain cases of small amount if plaintiffs, imagining that they might go farther and fare worse, should choose to submit their claims to his decision. There was no new officer created. The clerk of the peace for the county continued the clerk of the court, and the sheriff continued its ministerial officer as well for civil as criminal business. The Foxmaulian system on the contrary abolishes Courts of Requests and Conscience and County Courts (so far as personal actions are concerned), and replaces

them by twenty-five original circuit courts, to which it rigidly appropriates exclusive jurisdiction in all the cases we have already enumerated. It cuts up the country into as many districts as the privy council shall determine (clause 6), each being probably about twenty miles square (see clause 40); appoints a clerk for each district who shall be an attorney at law and shall receive not more than 500*l.* a year (clause 6); authorizes the lords of the treasury to appoint as many receivers-general and at such salaries as they shall think proper (clauses 10 & 11), to provide court houses and jails (what pleasant anticipations!), and to settle the accounts between the clerks and the treasury; and supersedes the sheriff by a cloud of bailiffs.

The Irish assistant barristers are allowed to practise. This increases their efficiency and keeps them *au courant* with their profession. The county judges are to be excluded from practice and from parliament. The former are thirty-four in number, while Ireland contains only thirty-two counties; the latter are twenty-five to fifty-two counties. In Ireland the attornies or the parties fill up the summonses or civil bills; here the district clerks are to do it, thus being made advisers of the parties in the first instance and therefore being liable to be charged, in case they mistake the plaintiff's remedy, with all that is implied in the phrase—"bringing grist to their own mill." In Ireland it is optional with parties to bring their cases in the Civil Bill Courts; here it is to be compulsory under forfeiture of costs. In Ireland a fee for professional assistance is allowed in all cases; here it is only allowed where the amount recovered or claimed in the action is over 40*s.* (clause 66). In Ireland appeals are allowed in all cases; here only in cases above 5*l.* (clause 64.) In Ireland the courts sit but once a quarter, and that is generally considered too frequent for the peace and social comfort of the people;[1] here they are to be almost continually sitting, and the judges are consequently empowered to huxter and peddle with defaulters as to how and when they can pay, and to issue decrees for payment by instalments (clauses 71, 73). In Ireland cases of libel, slander, seduction, breach of promise of marriage, and crim. con.,

[1] See the evidence taken before the Commissioners of Inquiry into the Administration of Justice in Ireland, 1828, *passim*.

are beyond the jurisdiction of those courts; here they are to be within it. In Ireland the Civil Bill Court is constituted a Court of Record, and thus the judge of it is summarily made entitled to all the privileges incident to the judge of such a Court; here there are a multitude of provisions to protect him from actions under certain circumstances, but in other circumstances he is to be liable to actions without end. (See Clauses 88, 95, 96.) The relative merits of the two systems we leave to the judgment of every impartial reader.

Every "philosophic" lover of cheap justice will, no doubt, conclude that the Irish system of Local Courts must be the greatest possible blessing to "the sister kingdom." Experience has proved it to be the greatest curse and most abundant source of demoralization that was ever inflicted on that country. It has been, is, and ever will be, the cheap and ready instrument for perpetrating every manner of abomination under form of law. The way in which our great reformer has adopted every evil contrivance that did or that does exist in it, is rather remarkable as a chain of coincidences, or as a specimen of ignorance of the subject of his quackery, or as evidence of very decided and zealous devotion to the doctrines of the worthy whose aspiration was—"evil, be thou my good."

We shall begin with the beginning. In the Irish summons or civil bill, as it was originally framed, there was no necessity for describing the parties by their residences or additions. This was found after some years such a frightful source of annoyance and injustice that an act (31 Geo. III. c. 31, s. 1) was passed, which made the description of both parties by residence and addition essential. The form of summons given by Mr. Fox Maule resembles in this point the original Irish one. It is a singularly precious document and we therefore present it to our readers.

"SUMMONS.

Demand £
Costs . .

County Court of ——

£

You are hereby summoned to appear at the County Court of —— to be holden at —— on —— the —— day of —— at ——

of the clock of the same day, to answer the complaint of —— who saith that you [*here insert shortly the grounds of the action*]; and in case you fail to appear by yourself or some person on your behalf, the complainant will obtain judgment and execution against you by your default.

TAKE NOTICE, that if you require a jury to be summoned to try this cause, you must give to Mr. (——), Clerk to the said Court, or leave at his office at (——) notice thereof in writing within *three* days after service of this summons upon you.

TAKE NOTICE also, that if, on the trial of this cause, you mean to set off any debt or damages which you claim to be due to you from the complainant in this cause, or to take the benefit of any Statute of Limitations, Statute of Bankruptcy, or for the relief of Insolvent Debtors, you must give to the Clerk, or leave at the office of the Court, notice in writing thereof *five* days at least before the said (——) day of (——).

Dated the —— day of —— in the year of our Lord 18

To Mr.

Entered —— Clerk.

By the Court."

Suppose this bill in full operation, and that in London, Birmingham, Manchester, Liverpool, or any other populous place, a summons was issued directed to James Smith, to answer the complaint of John Thompson, would there be a James Smith in the County Court district safe from the clutches of John Thompson, or any worthy who thought proper to assume that or any other *nom de guerre?* But the iniquities perpetrable under such a form of summons may be safely left to the imagination of the reader.

Observe how even the amount claimed is to be stated only in figures.

By the 12th clause it is provided that "the bailiffs of the said Court shall serve all summonses and execute all such decrees, warrants, precepts, and writs." This merely makes it the duty of bailiffs to serve summonses, if asked to do so, but does not make all service by others absolutely void. Hence parties will be at liberty to select agents of their own to serve or swear to the service. The evils attendant on this practice in Ireland are thus disclosed by Mr. O'Connell.

" Do not the abuses you have described in the Civil Bill Court arise very much from the facility with which you can obtain proof of the service of process in cases where no service of process has in point of fact taken place?—Very much: it is the easiest thing in the world to obtain evidence of the service of an unserved process.

" What is the present character of the individuals who are employed as process servers throughout the country?—It is considered upon cross-examination quite sufficient to establish that a man is a process server to have done with his evidence. I know in practice, instances, and the cases are not few, in which individuals obtain decrees in this way: they file a civil bill at the session: John Brown, for example, wishes to get a decree, and he files a civil bill at the sessions in the name of John Geary or John Sullivan: there is no service of course: he goes in, and though he is the person intending to have the decree himself, he proves the case and gets the decree, and goes and makes the distress, and sells the goods before there is a possibility of discovering the fraud. That has been attempted to be met by taking the bailiff up for a capital felony, as for stealing the cattle or whatever he seized, and when the assizes came on, I have seen him indicted for the felony, and he produced the civil bill decree: then it was said it was a fraud, and the man ought to be prosecuted for the fraud and the perjury—for the perjury it is impossible, for who is to identify the person to be the swearer at the sessions.

" Is it not a phrase perfectly understood in the country, ' stealing a decree?'—Perfectly understood: I have known this flagrant instance; there was a tenant of mine, who for a cottier tenant was comfortable; the man had five milch cows; he got a typhus fever, which extended to his wife and children; while he was lying in that state, two decrees were stolen upon him; every particle he had in the world was sold, and he was reduced to complete beggary. When I came to the country afterwards, and he made a complaint of this, I found that the man who had done so was also living as a tenant of mine, and I had no remedy in the world but to turn him off, for I found it impossible to institute a prosecution with success.

" Do you mean that that man owed nothing to the other? —He did not owe a shilling."[1]

As if, however, personal service, or swearing to personal service, of such a summons, on the victim selected for imolation in the new temple of justice, were too great a favour to be allowed him, the delivery of it ten days before the day of trial to himself, or " to his wife or servant, or any inmate at his dwelling-house or usual place of abode, trading or dealing, shall be deemed good service; and every such summons shall be read over and explained at the time of the service thereof to the defendant or other person to whom the same shall be delivered as aforesaid."—(Clause 39.)

Service on *any inmate,* without regard to age or character or connexion with the defendant, or any thing else. Well, such a clause is worthy of such a reformer. Any thing better would be out of place—*Qualis ab incepto.*

In the Irish Manor Courts, every species of fraud and villany was committed with impunity, in consequence of the warrants being signed only by the presiding officer of the court, and not being countersigned by any attorney, agent, or other person who might be responsible for the identity or conduct of the party taking it out. In the Civil Bill Courts this evil was provided against in some measure by causing the decrees to be signed by the assistant barrister, the clerk of the court, the sheriff, and the attorney of the party. The warrants provided by Mr. Fox Maule are precisely similar in this respect to those of the Irish Manor Courts. The evidence of Mr. O'Connell may give him some " useful knowledge" on this subject.

" Are there any circumstances which distinguish the effects of the execution of the process of the Seneschal Court from those which attend the execution of the decrees of the Civil Bill Court?—Yes; murders ensue upon it; at least manslaughter: human lives are lost, and that not unfrequently, in executing the decrees: they are executed by the parties who go in a violent way: *injustice has been perpetrated by the decree,* which gives a natural tendency to resistance, and each

[1] First Report of Committee on the State of Ireland, Session 1825, p. 55—57.

party arms himself as well as he can. A battle actually takes place, and human lives are lost. I have known that.

"This relates to civil bill decrees as well as those of Manor Courts?—Even upon civil bill decrees these battles are fought: there is, however, something more in the civil bill decree, *for the sheriff must sign that decree, and there is an attorney upon it, who though civil bill attornies do not rank so high as the others, yet he has a character and will be cautious.*[1]

"Injustice has been perpetrated by the decree, which gives a natural tendency to resistance." This is a truism with which Mr. Fox Maule seems unacquainted, and he therefore makes his judges infallible in all cases where the amount claimed is under 5*l.*, allowing, in such cases, no appeal (clause 64), or any means in any case above or below 5*l.* to parties taken by surprise to stop an execution. This will be very likely to generate a most profound respect and veneration for the law.

In utterly demoralising the Irish people, and producing the most incredible contempt for the sacredness of an oath, the Civil Bill Courts have been pre-eminently successful. On this, all persons acquainted with their working are agreed.[2] Mr. O'Connell says,—"*I am, in my conscience, thoroughly convinced that if a society were instituted to discourage virtue and countenance vice, it would have been ingenious indeed, if it had discovered such a system as the Assistant Barrister's Court.*"[3]

No part of their machinery has tended so much to produce this result, as that which enables the judge to dispense with a jury. A gentleman living in Dublin through the greater portion of the year, and coming down only once a quarter to a remote county, cannot possibly have any *criteria* for determining the character and credibility of the different individuals who deliver their evidence before him, and is compelled, from the very necessity of his position, to be guided by the person who is the most respectable looking,

[1] First Report, &c. ut antea, p. 57.

[2] See Rep. of Irish Commissioners of Inquiry into the Administration of Justice. Session 1828. Appendix, passim.

[3] First Rep. of Select Com. on State of Ireland, 1825, p. 57.

and the most fluent and plausible of the different controverting witnesses. The haste also with which he hurries over all cases, prevents him from weighing and sifting every statement with that caution, patience, and coolness, which are so necessary to detect the false and flippant swearer. In this country people can form no conception, as yet, of the velocity with which Irish Civil Bills are disposed of. Mr. O'Connell says, "As to the mode of proceeding in the Civil Bill Court, the hurry is excessive. There is no poetry in saying that justice is frightened away. Six thousand cases have been decided in a week."[1]

This summary mode of getting through the business must afford inconceivable facilities for committing perjury, without the fear of detection or punishment, and it has accordingly produced the results for which it is so admirably calculated. Mr. O'Connell, from his religious, political, and national predilections, must be the most satisfactory and least exceptionable witness against the character of the men of his own creed and country. In the Report of the Lord's Committee on the State of Ireland, we find the following evidence from him.

"The frequency of oaths has had a most demoralising effect upon the peasantry of Ireland; my opinion is, that the civil bill jurisdiction of the County Courts is most frightful and horrible in its effects upon the morals of the Irish people. The allowing a single individual to decide, who cannot possibly be acquainted with the bearings of character: in the first place, it is not bringing justice home to the peasant, it is bringing litigation: then a single individual decides; he has an immense number of cases to decide; he cannot possibly weigh the character, for he cannot be acquainted with its shades. In the next place, it is not pleasant to him to have that task; the jury keep each other in countenance, one man is not reproached with having discredited a witness, there are twelve on the jury, and therefore they protect each other. The assistant barrister is not so, he has not that protection; then if he decides, and I have seen this to a frightful and horrible extent, he will necessarily

[1] Cited in a Summary of the Principal Objections, &c. p. 43.

decide in favour of the flippant and distinct swearer; the swearer who has been trained to swear distinctly up to the fact that shall constitute the law. To have a conscience is an inconvenience therefore in the Civil Bill Court: if he is a man of character, scrupulous of his oath, he does his friend no good at all, but the ready and distinct swearer is beyond value; and it has had this effect, that in their dealings the peasantry in most of them employ their children, at a very early age, to be their witnesses, and they produce them at an age that it is frightful to look at them. When questions are tried by jury, there is a bonus held out to men to be of good character, for they obtain credit by it, and the trial by jury gives ordinarily a stamp upon character; now it would seem to me that the legislature ought to encourage, as much as possible, every thing that shall have a tendency to make character valuable: the civil bill jurisdiction, which takes away the trial by jury, takes away the tendency of value to character, and gives a tendency to flippancy of swearing. The employment of juries would have a tendency to diminish perjury, to increase the value of character, and of course to diminish the readiness of men of bad character to swear; it would have all the advantages of trial by jury, which, to my judgment, are very great."

We are confident that it is as needless for us now to indulge in eulogies on the advantages of trial by jury, as to "gild refined gold, or paint the lily," but we cannot avoid directing the reader's attention to the contrast that exists between the character of Englishmen and foreigners with regard to veracity. Throughout the world, an Englishman's word has become a proverb for a statement or pledge, about which no doubt can be entertained. What, we ask, can have such influence in producing this result, and making Englishmen respect their word with such fidelity as the consciousness that they know not the moment when their neighbours may be called upon, publicly and solemnly, to decide upon their character and credibility? Such a cheap, primitive and simple contrivance, for inducing every man to acquire or retain a character among his neighbours for truth, honesty and plain and straightforward dealing, ought not to be trifled with lightly. But what cares Mr. Fox Maule for

these antiquated notions? Is he, a knight errant in the cause of cheap justice, to be checked in his career by considerations which could have influence only with those simple minded animals, into whose brains a ray of the new lights of political economy, philosophy and reform has not yet penetrated? We were never profane enough to expect it, and he accordingly justifies the high opinion we have always entertained of him. By clause 45, he provides, "That the judge of the County Court shall be the sole judge to determine all actions" under *5l.*, and also all actions above that amount, unless (clause 46) the party requiring a jury shall give notice thereof in writing to the clerk, four days before the holding of the court, or, according to the summons, "three days after the service of this summons upon you;" and, at the same time, pay to the clerk of the court "such sum of money as shall be directed by any general order of the court, for or towards the payment of the expenses of the said jury."—(Clause 47.) We are almost surprised that the honourable under-secretary did not make the expression of a wish to have a case tried by a jury, an offence punishable by imprisonment as well as by fine. To copy still more closely the bad parts of the Irish system, the jury is to consist of three persons (clause 51), and to secure their integrity and respectability they are not to have less than five shillings a day (clause 50).

All modern pretenders to a little philosophy and statesmanship, affect to consider the common law system of pleading a great obstacle to the fair administration of justice. Such an objection is never heard from any one practically conversant with the law. Foreign jurists admire the system, and long for its adoption. Its multitudinous excellencies are readily admitted by those who have been once caught in the meshes of a Chancery net, and in short by all who can compare or rather contrast it with any other known system—for it is only by comparison that any one thing of human institution is good, bad or indifferent. It is said that the public are bound, for the purpose of preserving the peace of society and securing to each individual the enjoyment of his rights and property, to provide tribunals to decide all differences arising between party and party. So they are; but they are not

called upon to provide tribunals to decide such differences till the parties themselves have agreed as to what the differences are. This is the first object of the common law system of pleading. It compels the parties to state what are the real points in dispute between them, and then calls on the public tribunals to decide them. No government, without better reasons than have yet been stated, can be expected to supply tribunals at the public expense, to elicit the point in dispute between private parties. That is their own affair, and when they have agreed upon it, the public step in and decide it. Again, if we look at it merely as jurists, what can conduce more to a just decision of a question in litigation between two parties than to compel each to state in the first instance the claim or defence on which he relies, so that neither can have an unfair advantage over the other, and that there may be as few points as possible to engage the time and attention of the tribunal? In this respect our system of pleading is at this moment in a high state of perfection.

It must be obvious that it is as unjust to force a plaintiff to state his ground of action at full length, and to allow a defendant to come into court to resist it on every ground which ingenuity can devise, as it would be to allow the plaintiff to state merely the amount of his claim without giving any intimation of the ground of his action. Justice and common sense require that either each party or neither party should state the ground of his claim or defence, before he comes into court for a final adjudication. To tie down the one to the particular claim set out in the summons or writ, and to leave the other every possible mode of defence, is a plain palpable inducement to fraud, chicanery and litigation on the part of defendants. This has been the result of the system in Ireland. A plaintiff summons or "processes" a defendant. On the first day of the sessions he goes to the sessions town, perhaps 20 or 30 miles off, with one, two, ten, or more witnesses, as the case may require, for he must prove his case, whether the defendant appears or not, and must be ready to meet every objection; he waits there three or four days with his witnesses, the case is called on, the defendant objects that the court has not jurisdiction, or that the summons was not rightly served, or that the name,

or residence, or addition, or stile of either party was not rightly stated, or that there is something else wrong. If the plaintiff is a persevering fellow and has money to spare, he may after three or four defeats on such points be allowed to approach the merits of the case, and then be met with an objection founded on a variance, the insufficiency of a stamp, the inadmissibility of a witness, the form of action, &c. &c. If at last he gets a decree, the defendant may appeal to the assizes, where the plaintiff is again obliged to attend with his witnesses and prove his case, when the former objections may be reheard or new objections started, or the defendant having "got out" the plaintiff's case, may collect a proper supply of witnesses to controvert it.

Hence it appears that the odds in favour of defendants are beyond calculation. But when they can have all these chances together with interest on the money unpaid, for the inconsiderable sum of 6s. at the sessions court, and 10s. 6d. at the assizes—when from the haste and the way in which cases are gone through, the people generally have no very high opinion of the infallibility of the decision—when the judge is a total stranger to them, and can have therefore no influence on their conduct—when scarce any one but themselves, their witnesses and opponents can know the real nature of the transactions in dispute,—can we wonder that these courts and this system should be the most frightful source of demoralization that was ever yet invented?—so frightful that Mr. O'Connell should say of it, that if a society were instituted to discourage virtue and countenance vice, it could not have invented any thing better adapted to its purposes.

We do not pretend to insinuate that Mr. Fox Maule is a member of any such society, but we must give him the credit to which he is entitled for promoting its objects. By clause 52, he provides that on the day named in the summons the plaintiff shall appear in court, and the defendant shall be required "to answer the plaint, and on answer being made in court, the court shall proceed in a summary way to try the cause, and give judgment without further pleading or formal joinder of issue." If however any defendant wish to plead a set-off, the Statute of Limitation, or a discharge under a statute of bank-

ruptcy or insolvency, he must give notice thereof in writing to the clerk of the court, seven days according to clause 54, or five days according to the summons in the schedule (what remarkable uniformity !), previous to the hearing of the cause. As the summons need be served only ten days before the day for holding the County Court, a party who wants to take advantage of a defendant has only to serve the summons when he learns that his victim is likely to be absent from home for a few days. If the defendant do not appear, the case is to be heard on the part of the plaintiff, and such judgment given as if both parties had attended (clause 57).

The honourable under-secretary contemplates the necessity of erecting additional debtors' prisons in each county, as a consequence of this measure (see clauses 15, 77). His prudence and foresight in this instance also may be judged of by the following return to an order of the House of Commons, of the 17th of February 1836, of the number of persons committed to each prison in Ireland, during the preceding five years, under civil bill decrees, and the amount for which each decree was obtained :—

Persons Committed	under £1	£2 to £3	£3 to £4	£4 to £5	£5 to £10	£10 to £20	over £20	Total of five years
	1664	3121	1627	1219	3490	587	26	14,446

The Irish Civil Bill Courts, we repeat, have been made the most expeditious engines of oppression and extermination that were ever yet tolerated by law in any country making pretensions to Christianity or civilisation. In 1816, when the Irish landlords began to think it would be a profitable speculation to "clear their estates of live human lumber," an act was passed, authorising assistant barristers to hear cases of ejectment between landlord and tenant. At first their jurisdiction was limited to cases where the rent was not more than 20*l.* a year. Subsequently it was gradually raised, till at length it reached the moderate sum of 50*l.* At first the ejectment summons or process should be served thirty days before the day of trial; now it need be served only fifteen days. The expense of the entire proceeding was and is under

2*l.* By this system the landlords have been enabled to effectuate those extensive and extraordinary clearances which occasionally attract attention even at this side of the Channel. The unfortunate tenantry, taken by surprise, through the shortness of the notice, unable to pay up their rents, or to adopt the proper measures for availing themselves of the few and slender chances of defence left them in the Assistant Barrister's Court, are voted out of their possessions in a style and fashion of which no one can have any conception who has not seen seven or eight ejectment cases disposed of in half an hour; and then, in the characteristic wanton perversity of their nature, they refuse to bow down and worship the majesty of British law, and resist the execution of the decrees of the Courts of—Justice!

Now, could any man conceive that the day should ever come when a British minister would be found to propose the adoption of the same system for the people of this country? Gravely to propose that every man in this country paying not more than 20*l.* yearly rent might be turned out of his home by the vote of a single judge, and on ten days' notice? Such is Mr. Fox Maule's proposition. By the 86th clause he provides, that when the term or interest of any tenant of any house, land, or other corporeal hereditament, the rent whereof shall not exceed 20*l.* a year, shall have ended or been determined by a notice to quit, and the tenant shall not deliver up possession, it shall be lawful for the landlord or his agent to issue a summons from the County Court, and for the judge of that Court to hear the case whether the defendant appears or not, and to issue a warrant to the sheriff of the county, authorising him to give up possession as upon a writ of *habere facias possessionem*. The mode of serving the summons that is thus to determine whether after the lapse of a few weeks a family are to enjoy the comforts of their own fireside, or to be turned adrift on the world as houseless vagrants, is truly worthy of Mr. Fox Maule. We give the clause (87) entire, only marking a few words in italics.

"And be it enacted, that such summons as last aforesaid may be served either personally or *by leaving the same with some person being in, and apparently residing at*, the place of abode of the person or persons so holding over as aforesaid:

provided that if the person or persons so holding over, or any or either of them, cannot be found, and the place of abode of such person or persons shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person or persons respectively."

If the party suing out the warrant of ejectment should not have lawful right to the possession of the premises, the execution is to be stayed "in case any such tenant or occupier will become bound with two sufficient sureties as hereinafter provided, to be approved by the clerk of the court, in such sum as to the judge shall seem reasonable, regard being had to the value of the premises, and to the probable costs of such action, to sue the person by whom such warrant was sued out with effect, and without delay, and to pay all the costs of the proceeding in such action in case a verdict shall pass for the defendant," &c. &c. (clause 90.) The inevitable result of these provisions will be to place every poor man, who cannot get sureties to pay the costs of an action, at the mercy of every scoundrel who may wish to take advantage of these sapient specimens of "cheap justice legislation"—to make the poor of this country as much serfs and slaves as those of Ireland have been, and to produce among them the same misery and oppression, and consequently turbulent resistence to the law, which have characterised the Irish. But to considerations of this kind Mr. Fox Maule is too enlightened a statesman to pay any attention. May we therefore appeal to him as a mere political partisan, and ask him does he think it will be for the interest of the radicals to pass a law to enable the landlords of this country to eject four-fifths of the borough, and half of the county, constituencies at ten days' notice, and at a cost of 15*s*.?

But we are weary of comparing this singular specimen of "cheap justice" reform with its Irish prototypes or predecessors, or by whatsoever other name they may be called, known, or designated. We shall therefore both by way of variety, and for the purpose of discovering, if possible, whatever latent virtues it possesses, pursue a different mode of examination through the remainder of this paper.

The first clause opens with this *naïve* preamble, "Whereas there is much need of Courts of Summary Jurisdiction for the recovery of small debts, and for other purposes hereinafter specified, to be established throughout England: And whereas the sheriff of every county hath authority in his County Court to hold plea of personal actions where the debt or damage doth not amount to 40*s.*, and it is expedient that the jurisdiction and practice of the said Courts be extended and improved, and that provision be made for holding the County Court for the purposes aforesaid before a judge of competent knowledge," and enacts that it shall be lawful for the Chancellor to appoint throughout England and Wales any number, not more than twenty-five persons, to be judges of the County Courts, every one of whom shall be a serjeant at law or a barrister of seven years' practice, or an attorney of one of the Superior Courts of Common Law at Westminster of ten years' practice, and to remove any such judge, if he shall think fit, for misbehaviour or for any sufficient cause, to be stated in a petition to be preferred for that purpose by the justices of the county in general or quarter sessions assembled; and that no such judge shall practise during the continuance of his appointment. Clause 3 enacts that he shall not be capable of being elected or sitting as a member of the House of Commons; and clause 11, that his salary shall not be less than 800*l.* or more than 1500*l.* a year.

On these clauses a variety of questions suggest themselves. If it be so necessary to facilitate the recovery of small debts, why facilitate the recovery of those only for which a personal action lies, and leave those untouched which, if they can be recovered at all, must be recovered in equity? Since the time of Bacon it has been a ground of demurrer to a bill in Chancery, that the amount claimed by it is under 10*l.*,[1] and it is well known that no man ever dreams of filing a bill in an Equity Court for less than 100*l.* Here then was a grievance for the dabbler in cheap justice. But he most probably knew nothing about it.

Why require a certain number of years' standing to qualify for the office of judge? Competence to discharge the duties

[1] See Story on Eq. Pl. p. 319—320.

should be the only requisite. A person practising under the bar as a pleader or conveyancer or draughtsman, has surely as good opportunities of learning his profession as the barrister of seven years' standing, who for 800*l.* a year gives up all prospect of success, consents to supersede the learned commissioners of the Courts of Requests, and to go through all the fagging and drudgery which by this bill are provided for him. There is no standing required to become Lord Chancellor, Chief Baron of the Exchequer, or Chief Justice of the Queen's Bench. Why then require it for a judge of the County Courts?

The provision as to attornies is merely "a sop to Cerberus." We shall not venture to predict how many of those gentlemen will be raised to this high and mighty office; but merely ask why are not solicitors to be admitted to this dignity? Can it be that Mr. Fox Maule did not know that they were not included in the attornies of her "Majesty's superior Courts of common law at Westminster?"

The provisions to prevent the judge from practising, or being a member of parliament, seem to put the climax to the character of those who are expected to fill the situation. We will henceforth take it for granted, that none but members of the bar will be appointed to the office. What purpose can it serve to cut them off from all connection with their profession? To eradicate from their minds all professional and political ambition? To proclaim them as hopeless imbeciles, who, for the consideration of 800*l.* a year, have fixed themselves down for life as the travelling drudges of "the Cheap Justice Delivery Company?" Ought not the object of the framer of this measure to be to make the office as desirable as possible to men of ability and practice? to men who might be reasonably supposed to be competent to discharge its duties? Ought it not to be held out as a stepping-stone to something better? As a school for the Bench? What political concerns come under the cognisance of the county judge to disqualify him from sitting in parliament? He has no criminal jurisdiction; Recorders have; yet they are allowed to sit. If he could persuade a constituency that he could do them more good, notwithstanding the multiplicity of his duties than any body else, why not allow him to relieve the dull

monotony of his labours, or show off what was in him, by now and then joining in a parliamentary melèe? Did Mr. Fox Maule want to select five and twenty of the greatest boobies in Westminster Hall, we should like to know what more efficacious course than this he could have pursued?

But this pre-eminent reformer of our juridical institutions is not content with selecting boobies in the first instance, he is resolved to keep them in their primitive condition of boobyism to the end of the chapter. Everybody knows, except perhaps Mr. Fox Maule, that nothing tends more to make judges courteous, patient, and painstaking, to study and attend to their profession, and in short to discharge all the duties of their station in an efficient and becoming manner, than their being watched, checked, and controuled by a learned, respectable, and independent body of practitioners. Were we to make that most amiable of judges, Chief Justice Tyndal, as unobserved and uncontroulable in his Court as a Turkish cadi, he would most probably, in the waywardness of human nature, soon begin to indulge in some of the pranks, which fable and history record of those learned oriental functionaries. But what thinks the great "cheap justice" reformer on this subject? Clause 66 provides, we give it entire,—it would be a pity to spoil by abridging it—"That no person, except by leave of the Court, shall be entitled to *argue any question as counsel or advocate* for any other person in any summary proceeding in the County Court; and no person, not being an attorney admitted to one of Her Majesty's Superior Courts at Westminster, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said County Court, and no attorney shall be entitled to have or recover therefore any sum of money, if appearing on behalf of a plaintiff, unless the debt or damage recovered shall be more than forty shillings, or if appearing on behalf of a defendant, unless the plaintiff claim more than forty shillings, or to have or recover more than ten shillings for his fees and costs, unless the sum recovered, if he be attorney for the plaintiff, or sum claimed if he be attorney for the defendant, shall be more than five pounds, or more than fifteen shillings, in any case within the summary jurisdiction given by this Act; *and the expense of employing an attorney*

either by plaintiff or defendant, shall not be considered as costs in the cause, unless the judge shall otherwise order."

This clause makes the County Court judge a regular despot in his own court. But if we further consider that he is to be stationary for life in the same set of districts, that practitioners before him have no chance of a change of despots while he lives, and must emigrate to some other part of the country if they happen to displease him, we must see that every one driven to practise before him would be completely at his mercy,—that nobody would dare to controvert him, and that he consequently would soon bully and browbeat without limitation or restriction, and become an utter nuisance to the public, and a disgrace to a bench of even—cheap justice.

On what principle of economy or justice does this high and mighty and transcendental statesman propose that in cases under 40*s.* neither party should be allowed fees for an attorney? How are the old, the young, the dumb, the blind, the sick, and the silly to manage? Must women become their own pleaders? On what authority or precedent does he make such a monstrous proposition? The common law commissioners are opposed to it. In the Irish Civil Bill Courts a fee is allowed in all cases. If a defendant unjustly refuses to discharge his debts, why should he not be made to pay for his villainy? Is the legislature to encourage him in robbing his neighbour, and to enable him to exact a liberal discount whenever he owes less than forty shillings? But the entire clause is so palpably the result of utter ignorance of business, and of silly narrowminded hostility to both branches of the profession, that it would be "extravagant excess" to dwell at any length on its manifold absurdities. We may however be permitted to observe that the second paragraph clearly implies that persons who are not barristers or attornies may act for others in the County Courts, though they shall not be entitled to recover fees for their actings. This we imagine is the obvious meaning of it. If so, we would wish to ask Mr. Fox Maule whether it is through pure fun or a combination with the Chancellor of the Exchequer to improve the revenue, that he thus lays a trap for all those adventurous worthies who, having no other lawful occupation, may wish to try their hands as agents or barrettors in the

County Courts, without having the fear of the 12 Geo. 2, c. 13, s. 7, before their eyes. Probably he knew nothing about it, or he would in due form propose the abolition of so nefarious an enactment, made expressly, as he would say, for the sole and exclusive benefit of regularly certificated sharpers.

As we are just now warmed with the *argumentum ad crumenam*, we may be excused for noticing the extraordinary favour which bailiffs have obtained in the eyes of this enemy of lawyers. In fact the bailiff is the only person who will be well paid under the new dispensation, as may be seen from the following list of his fees, as laid down in the schedule:—

	40s.		£5.		£10.		Above £10.	
	s.	d.	s.	d.	s.	d.	s.	d.
For the service of every Summons, Order, or other proceeding	0	6	0	6	0	6	0	6
Calling Plaintiff or Defendant in Court	0	2	0	2	0	4	0	6
For taking Goods in Execution	2	0	3	0	4	0	5	0
For taking Body in Execution	3	0	5	0	7	0	10	0
Assistant Bailiff	1	0	1	0	2	0	2	6
For every mile travelled by Bailiff more than one mile from the Court House to serve Summons or execute Warrant	0	6	0	6	0	6	0	6
For every mile travelled by Assistant Bailiff more than one mile from the Court House to assist in execution of Warrant	0	6	0	6	0	6	0	6
For every mile travelled by Bailiff in taking any person to Prison, for himself and Prisoner	1	0	1	0	1	0	1	0

From this schedule the intelligent reader will perceive among other things, that a bailiff is to have sixpence for the service of every summons, and sixpence more "for every mile travelled more that one mile from the court house to serve summons." Let us suppose that the court house is on the average ten miles from every defendant's house—this gives the bailiff *5s. 6d.* for every service. "They manage these things better in" Ireland. There the bailiff gets but sixpence for each service, and such is the number of Civil Bills served that it is considered ample remuneration. This Mr. Fox Maule might have easily ascertained, but it is unreasonable to expect that a great man like him should have taken the trouble to look through the schedule of an Irish Civil Bill Act, or of putting a question to an Irish official on the subject.

After the preceding evidences of legislative wisdom, our readers will not be amazed to find that all pleas in the County Court "shall be heard and determined in a summary way," and that the judge "shall have power to make such orders and decrees thereupon, as shall appear to him to be *just and agreeable to equity and good conscience.*" (Clause 37.) Perhaps they may after this have the curiosity to desire to know the precise amount of the jurisdiction to be assigned to him. He is to hold plea of all "personal actions, where the debt or damage doth not exceed the sum of twenty pounds," (clause 37,) of those cases of ejectment which we have already particularised, and of actions of replevin where the amount in dispute is not more than twenty pounds, (clause 84,) and if (clause 97,) "Any action shall be prosecuted after the commencement of this Act in any Superior Court of record for any cause for which a plaint might have been entered in the County Court under this Act, and the verdict shall be found for the plaintiff for a sum not exceeding twenty pounds, the said plaintiff shall have judgment to recover such sum only, and no costs, and shall have execution only against the goods and chattels of the defendant, and shall not at any time be allowed to maintain any action on such judgment in any Court; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the plaintiff had a probable cause of action for the debt or damages sought in such action, to an amount exceeding twenty pounds."

Just conceive the rusticated cadi of a County Court hearing and determining in a summary way, and according to equity and good conscience, all manner of personal actions from simple contract to slander, libel, breach of promise of marriage, seduction and *crim. con.*, and settling them off-hand at the rate of 100 or perhaps, as in Ireland, of 1000 a day. By what figure of speech can the gentleman who drew this bill include these actions in a measure professedly designed, according to the preamble, for "the recovery of small debts"? What a genius for legal reform he must be, to establish a Court for determining personal actions according to equity and good conscience, and yet give it no jurisdiction over purely equit-

able cases! Had he looked into the Irish Civil Bill Acts, he would have picked up a little information on this head, that might do him some good.

Look next at that 97th clause, constituting in itself a new statute of costs. Who can safely, after such a clause becomes law, bring an action in a superior Court when the damages are unliquidated? Is it possible that any one acquainted with this subject could propose such a provision? In the Irish acts the costs follow the ordinary course, unless the judge shall certify that the action was not fit to be brought into the superior Courts, and ought to have been tried in the Civil Bill Court.

In the conscientious discharge of the duty we have undertaken, we must give Mr. Fox Maule the credit of having looked to one clause at least of Lord Brougham's Bill, before he submitted this measure to the legislature. With the notions of respect which we entertain for Westminster Hall and trial by jury, it affords us unspeakable comfort to find that so great a reformer should consult any work, or even once look about him, before he proposes the partial abolition of those vestiges of feudal and barbaric antiquity. The clause to which we are so much indebted is the 40th, which provides "that all suits shall be tried at the Court holden for the district wherein the defendant or, where there shall be more than one defendant, wherein any one of the defendants shall dwell or carry on his business at the time of the entry of the plaint, or wherein he shall have dwelt or carried on his business during six calendar months next before the time of the entry of the plaint, and in the last case service of a summons or other process on a defendant in the manner hereinbefore directed shall be deemed good service wherever he may dwell in England at the time of the entry of the plaint: provided always, that where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point in the district within which the defendant dwells, the plaintiff may bring his action, if he shall so think fit, in any of her Majesty's superior Courts, as if this act had not passed."

The provision as to costs renders this last proviso completely inoperative. The ruinous effects of a similar clause in Lord

Brougham's bill were commented on in a pamphlet printed for private circulation in the following words:—"The seventeenth section provides that the action shall always be brought in the district where the defendant resides, whether the plaintiff be resident there or not. This provision will be productive of the greatest inconvenience, particularly to wholesale dealers in London and the great trading and manufacturing towns, whose credits are now extended, by means of travellers and correspondences, into the remotest corners of the kingdom. Under Lord Brougham's bill, whenever one of these traders has to sue for the balance of an account, he will be obliged to employ a provincial attorney, hitherto an entire stranger to him, to take the necessary steps, and when the trial is fixed, to dispatch his clerk or traveller, probably from a distant part of the kingdom, to give evidence of the debt. At present the trader either selects the county which is most convenient to him, or brings the action in London or Middlesex, thereby greatly lightening the costs of both parties; for as a large majority of these cases are only defended for time, it is obviously the interest of the defendant, who is ultimately liable for the costs, that these costs should be as light as possible. Considering that the burthen of proof generally falls upon the plaintiff, that he is right in a great majority of instances, and that the judgment, when obtained, often turns out unproductive, there can be little doubt that, if either is to have a preference as regards the district in which the suit is to be tried, the preference should be awarded to him. It is obvious, however, that the whole provision has been concocted in entire forgetfulness of the changes that canals, and rail-roads, and mail coaches are operating; that Lord Brougham is really legislating for those good old times when a man made his will before setting out from York to London, and the saving clause of *God willing* was attached to an advertisement that the Dispatch coach would make the journey in three weeks. But dealings are no longer confined to neighbours;—even amongst agriculturists, generally regarded as the most stationary part of the community; the larger part of whose business is now transacted at the great central markets and fairs."

The 59th section of the present bill contains a provision similar to that complained of in the following passage.

"A great aggravation of the evil just stated is to be found in the twenty-eighth section of the bill, authorizing the examination of the parties upon oath. Under this provision, a London merchant, or all the members of a London firm, might be compelled to set off at the shortest notice for a distant county, and follow the judge round his circuit till he was at leisure for the examination; or why should not the Duke of Newcastle, or any other nobleman who might find it necessary to bring an action of debt for his rent or an action of trespass for an aggression upon his preserves, be had down from London and examined as to his motives for bringing it? Nothing more would be necessary than for the defendant, on an *ex parte* hearing, to suggest a plausible excuse to a local judge, probably mixed up with the factions of the place. *Vivâ voce* examinations are also objectionable on the ground that they hold out a strong temptation to perjury, and would end in a general wrangle in nine cases out of ten. Examinations before arbitrators afford no precedent; for these can only be taken by consent, and the consent implies the absence of any material personal inconvenience to either party. Yet even with this restriction it is far from certain that this departure from ordinary practice does good upon the whole."

But what renders this provision in the present bill peculiarly atrocious, is the class of actions that may be brought in the County Courts. Only imagine, as Sir Frederick Pollock observed in the late discussion, a plaintiff in an action for libel, defatnation, seduction, breach of promise, or *crim. con.*, driven into the witness-box and cross-examined by the defendant.

After the very extraordinary diligence employed by the contriver of this measure, in providing that every case should be stated, argued, heard and adjudicated in the worst possible manner in the first instance, it is only reasonable to suppose that the like ingenuity and precautions should be manifested in the mode of procuring a revision or reversal of the judgment. Up to 5*l.* the new judges are to be infallible, and their first decision immutable. In cases tried by juries they can, on application being made to them, order a new trial, but if the verdict be for the same party on the second trial, such verdict shall be final (clause 65). But if not, we suppose the third verdict will settle it;—"once, twice, thrice."—Why

not adopt a dice-box at once? The only mode of appealing to a superior court in personal actions is that indicated by the 64th clause, which enacts, "that no plaint entered in the County Court holden according to the provisions of this act, nor any order, judgment or proceeding therein shall be removed into any superior court by any writ or process whatsoever, except by leave of a judge of one of the superior courts at Westminster, in the county palatine of Lancaster, by leave of a judge of the Court of Common Pleas at Lancaster, and then only in cases where the debt or damage claimed shall be more than five pounds, or in cases where the right to lands, tenements and hereditaments, or to any tithe, toll or franchise is in question, or in cases where the complaint made is of the extortion or misconduct of a bailiff of the court, acting under colour or pretence of process of the County Court, and upon such terms as to giving security for payment of the debt or damage and of the costs incurred in the County Court, or to be incurred in such superior court or otherwise, as the judge of such superior court shall direct, and every such order and judgment of the County Court, except as aforesaid, shall be final and conclusive between the parties."

This is the very worst possible mode of conducting an appeal. Instead of submitting to the superior court a single point of law for its decision, the whole case is again gone through, and at immense expense. Thus after every precaution has been taken to secure as bad a decision as possible, and in the worst and cheapest manner imaginable in the court below, every precaution is likewise taken to obtain its revision in the court above in the worst also but most costly manner imaginable. But such has been the course of human affairs from the beginning of time, and such it will be to the end, whenever empirics meddle with what they do not understand. This mode of appealing has produced, as we have shown, the worst possible results in Ireland, and has for that reason possibly become the object of Mr. Fox Maule's adoption: No, we are wrong in saying adoption; we believe he never gave himself the trouble to ascertain whether any such absurdity had been ever before perpetrated in any quarter of the world. It is merely a coincidence in bungling.

The mode of appeal provided in cases of ejectment is to allow the tenant to bring an action of trespass against the landlord, bailiff, sheriff, judge, &c. &c. (See clause 88, 89.)

There are many other singularly nonsensical and mischievous provisions in this measure; but we fear our readers will consider that we have bored them with too many already, and will be disposed to ask why we have confined ourselves so much to details? Our answer simply is, that, if we had not gone into these details, we could not demonstrate the frightful results that would be inseparable from the operation of this measure, or prove that the framer of it had not the remotest glimmering of an idea as to the existing modes of administering justice in both kingdoms, or as to the evils which require redress, or the way in which they should be redressed, or the attempts which have been made to redress them, or as to the real character and consequences of his own measure,—that this was obviously the production of a man singularly and supereminently ignorant of the subject to which it related, that it was so palpably absurd and ridiculous that the common law officers of the Crown did not seek the honour of proposing it to the House of Commons, but left it in the hands of a gentleman, whose failure on such a matter could not be the slightest disgrace to him, as he never affected or was supposed to know anything about it,—that it could never be intended to be carried through the legislature,—that it was brought forward merely to serve some temporary political objects, which it is impossible for mere lawyers like us to unriddle, and that, in short, it would be a gross insult to both Houses of Parliament seriously to submit such a crudity for their adoption.

But, were the details of the measure as perfect as a thorough knowledge of the subject could make them, we could never give our sanction to a scheme the main feature of which was to locate two or three district clerks in every county, to advise and institute legal proceedings at a rate which would be tempting from its cheapness, and to have a court sitting almost continually to decide them, in a manner equally ready and tempting. Such a system would inevitably, in the course of a few years, destroy all good, neighbourly, and sociable feelings among the people, engage the whole community in a con-

tinued round of contention, and turn every little hamlet into a "normal school" of litigation. As soon as any trifling differences should occur between neighbours, they would run to the district clerk, who, like a stationary genius of mischief, would be ever at hand "bound by his duty and oath of office" to supply them with missiles of mutual annoyance. Before their blood could cool, or friends or reason interpose, the County Court, with its cheap temptations, would assemble, and thenceforth they would be committed to a strife in which hate and pride and all uncharitableness would urge them on to seek each other's ruin and disgrace.

Then how eloquent is that provision for payment by instalments? County Courts are to meet so frequently that they would enable creditors to ruin honest debtors by taking them by surprise. Is it not obvious, that the working of such a measure is calculated to eradicate all those notions of kindness, humanity, and forbearance, which now regulate the conduct of creditors and debtors. At present, if a creditor were to take an unfair advantage of an honest man, and persecute him needlessly and precipitately with legal proceedings, his whole neighbourhood would scout him as a heartless worthless scoundrel, and come to the rescue of his victim. But if this Bill pass, no creditor will think of being guided by any measure of kindliness or forbearance but what is supplied by the County Court, and no debtor will be indebted to a neighbour for that forbearance which he can get as a matter of "good conscience and equity" from the judge of the County Court. Such would be the results of this measure, were it, as we have said, as perfect in its details as a thorough knowledge of the subject could make it; but when it is, as we have shown it to be, as bad in its details as in its main features, and calculated to produce all manner of fraud, chicanery, litigiousness and perjury, and to change the very nature of our whole population:—we ask, can any branch of the public be content to adopt it?

But we shall be told, that the public are anxious for the adoption of some measure of cheap justice, and that it is absolutely necessary to comply with their wishes. We might reply, that it is not the first time the public were anxious for what was not good for them: but the loud and general cant

on this subject requires another answer. We are as sincerely desirous as any person can be to make the administration of justice as cheap as it can be made with safety and utility to the public. But justice is like every article which is the product solely of individual labour and talents; it cannot be had in a state, in which it is safe or worth while to accept it, without giving a proper remunerating price to the parties engaged in producing it. There is a price below which you cannot with safety trust your chin to a barber, if he know that you have more money about you. Thus also, until barristers, attornies, clerks, and sheriffs, are made by machinery; until automaton judges are sent by post; until learning, patience, good sense, industry, and eloquence, can be supplied by steam or electro-magnetism, those who are possessed of these articles will, like other tradesmen, charge a proper price for the use of them, and litigation will be attended with proportionate cost to those who indulge in it, unless the wisdom of the legislature should adopt some mode of enabling private parties to conduct their squabbles at the expense of the public. The enormous sums given in the shape of special retainers are a sufficient indication of the general conviction in this respect.

But not to be wasting time and space on truisms, let us give a few parting hints to Mr. Fox Maule. If he be desirous of really cheapening and facilitating the administration of justice, let him first see what can be done by introducing some arrangements by which causes may be heard as soon as they appear in the cause list, so that there may be no remanets or unnecessary delays, and of course none of the intolerable expenses attending them. Any one conversant with business might point out to him a variety of easy inexpensive improvements of this kind. We might do so, but we fear he or Mr. Attorney or Solicitor General might think we were poaching too far on their manors. If, however, these improvements should not be sufficient, if the demand for Local Courts should still be continued, and if it should be essential to create some new offices, let him appoint a barrister as an assessor to every sheriff in England and Wales, who would hold a Court in every county at the same time and place as the Quarter Sessions Court, so as to secure the attendance of jurors, professional men, and all

others whom it may concern, at the smallest possible cost and inconvenience, and who would then and there hear all the cases which can now be sent for trial before the sheriff from the Superior Courts; or if it should be deemed necessary, let the jurisdiction be extended to any sum that may suit the wishes and convenience of the public. These barristers would cost much less than the district clerks, whom he now proposes to appoint; for of these there are to be as many to a county as there are squares of twenty miles in it. They would interfere with no established tribunals; they would hear the cases in a satisfactory and proper manner that are now most sadly mangled by the sheriffs. In short, they could do no injury, and they might do a great deal of good. With the improvements which we have thus indicated, we would venture to say that *justice* would be administered at half the sum which *litigation* would cost by this County Court system. Nay, we would assert without the slightest fear of contradiction, taking further into consideration the present excellent system of pleading, the extensive powers of amendment allowed to the judges (none are given to the County Court judges), the numerous contrivances for diminishing the expense of proving documents, and the large proportion of cases in which judgments are allowed to go by default, that the difference in point of expense alone would be still greater in favour of the existing system. But we do not look on ourselves as infallible, and shall not therefore wrangle with Mr. F. Maule if he do not adopt our suggestions. Only let us in conclusion beseech of him to try or adopt any thing before he inflicts on us the curse of a system infinitely, immeasurably, worse than that which Mr. O'Connell on his oath declares to be so frightful and horrible in its demoralising effects, "*that if a society were instituted to encourage virtue and countenance vice, it would have been ingenious indeed if it had discovered such a system.*"

ART. V.—ON THE CUSTOMARY ESTATE OF TENANT-RIGHT IN THE NORTH OF ENGLAND.

It was observed by Lord Ellenborough,[1] that the customary estates known by the denomination of tenant-right were peculiar to the northern parts of England. This statement seems to be perfectly correct, and the circumstance will not only serve in some cases as a means of distinction from lands of other somewhat similar tenures, but will also account for the peculiarities of their condition. These peculiarities are very singular and interesting, and though they have been scarcely noticed even by those who have undertaken to write general treatises upon the subject of customary tenure, and have been very insufficiently distinguished from ordinary customary freeholds, there are many important points relating to them which would seem to require discussion, and some of which we now propose to lay before our readers.

It will be proper, in the first place, to ascertain exactly to what description of tenure these lands must be referred. When this preliminary inquiry has been accurately settled, it will be no difficult matter for the reader to deduce the general rules which may be applicable to them. It will be shown, however, that this previous subject is not, in *all* cases, free from doubt, and that lands of the above description may, in some cases, partly correspond with the properties of lands of common freehold, and, in other cases, may still preserve all the characteristics of a copyhold tenure.

The custom of tenant-right seems to have originated from the incessant incursions of Scottish marauders into the northern counties for the purposes of plunder and open robbery. These fearful and destructive forays were, in fact, considered to be, not merely the stealthy advances of rapacious thieves, but as the legitimate consequences of a system of legalized and interminable warfare, the operations of which had no necessary connection with the general terms of accommodation between the two great divisions of the island. These perpetual struggles of the border did not cease till the time of Elizabeth, when the reins of both governments were stronger,

[1] 4 East, 288.

and the prospect of a union rendered such lawless proceedings more disgraceful. Till this period the proprietors of the north of England were exposed to the sudden and desperate attacks of these freebooters, and it became necessary to provide some regular system for giving the alarm to enable the owners to secrete their goods and drive their cattle to a place of safety, and for assembling all the able inhabitants of the district for the common defence. The vestiges of these fortified and often picturesque points of reunion are still visible to the wandering traveller, and other traces of this system of defence are still strongly apparent not only in the traditions of the people, but in the customs connected with our immediate subject.

In order to establish and perpetuate this system of defence, lands were granted by the lords of the manor to tenants upon the express condition, to aid on all occasions in keeping watch, and giving the alarm, and, on the advance of the enemy, to appear in defence of the public stock, and to assist in driving the marauders back to their own settlements. These lands were descendible, and liable to dower, in a manner different from the common law, but similar to many of the customs applicable to copyholds or common customary freeholds in various parts of the kingdom. The mode of alienation was by a deed of customary grant, or of bargain and sale, without requiring any interference on the part of the lord, except his acknowledgement of the tenant, either by admission or enrolment; and in either of the latter cases, the estate seems to have effectually passed by the deed entered into between the tenants themselves when thus recognized by the lord.[1] In some cases, perhaps, an actual surrender might be made into the hands of the lord, though it may be doubted whether the lands were then not ordinary copyhold or customary property. These lands were also distinguishable from many others by their incapability of being devised, either directly, like lands of common socage, or indirectly, like lands of common copyhold tenure. The only mode of defeating the claims of the heir at law was to effectuate the intentions of an owner by a

[1] See Doe d. Earl of Carlisle v. Towns, 2 Barn. & Ad. 585.

trust deed *inter vivos*, under which an equitable estate was passed to the intended devisee, on the execution of a will.

It may now be inquired, what description of *ancient* tenure was thus constituted. In the first place, it will be remarked, that the services, which are the badges of tenure, were *free* and *uncertain*. Such were the qualities of the military service, or a service by escuage, a species of knight service.[1] But the tenant-right estate was never created in the same manner as that of knight service, which required certain proportions of land, and the absolute title to which was completed by livery of seisin. Neither was the tenant visited, happily, with the rigorous incidents which distinguished the splendidly wretched condition of the tenant by knight service. The uncertainty of the services makes it equally impossible to contend that it was a tenure in common socage—the source of our modern freeholds; a tenure which equally requires the ceremony of livery of seisin. The free nature of its services preserved it also from the imputation of villenage, whether pure villenage, the source of our modern copyholds, or privileged villenage, the origin of the ordinary customary freeholds, and some lands in ancient demesne.

The tenure of the estate of tenant-right, therefore, was a mixed tenure, and incapable of being distinctly identified with any of the great tenures of former times. The freedom and the general nature of its stirring services,[2] combined to give it the character of a military tenure; but, on the other hand, the mode of alienation, accompanied with the consequent admission of the tenant in the rolls of the manor, the exclusion of the tenant from the county court, his inability to be sued, or to sue for his lands in the king's courts, his liability to be ousted for default of payment of his rents and performance of his services, sufficiently indicate, that though the tenant may have acquired a freehold *interest* in the lands, independent of the will of the lord, he had not acquired a freehold *tenure*,[3] and that the recognition of the

[1] Co. Litt. s. 99.

[2] In one manor, some of these tenants are described in an old presentment, as withstanding and repelling the enemy, and doing their service upon the borders on their best horses, for their better abilities and *their own pleasures*.

[3] Black. Law Tracts.

tenant by the lord on the manorial records suffice to establish a feudal relation allied to, if not identified with, that subsisting between the lord and a copyhold tenant.

Such must be considered to have been the condition of this peculiar species of tenure, previous to the statute of 12 Charles II. c. 24, which has been termed the Magna Charta of the civil property of the kingdom. By that statute all lay lands not previously of the tenure of common socage, except grand serjeanty and copyholds, were reduced into that tenure, and have since assumed, with other lands, the general denomination of common freeholds. The operation of this statute upon the tenant-right estate, was to convert so much of its services as savoured of the tenure by knight service into the tenure of common socage, and to leave it, in respect of its other incidents, in the same condition as before. For copyholds are expressly exempted by the statute, and under that term must be comprised not only all pure copyholds, but all lands of customary tenure which acknowledge the necessary acquiescence of the lord in order to confer an exclusive and legal enjoyment.

If lands of this description were alienated by surrender and admittance, there could be no doubt of their falling within the exception of the statute of Charles. But in cases where this mode of transfer, if it ever existed, may have been departed from, or where the simple grant or bargain and sale, followed by enrolment, was coeval with the origin of the tenure, it might have been contended that such a tenant did not hold his lands by copy of court roll, and that his tenure was therefore converted into that of common socage. But it has been held otherwise, and lands so situated are considered to be held by copy of court roll, within the enlarged sense of those words as they occur in the statute of Charles.[1] It may, therefore, be laid down, that in all such cases even the entry of a tenant on the rolls of a manor will be equivalent to a formal admittance, and, accompanied with his attending the summons of the lord to the manorial court, in the capacity

[1] Doe d. Reay v. Huntingdon, 4 East, 271; Burrell v. Dodd, 3 Bos. & Pull. 378; Stephenson v. Hill, 3 Burr. 1278.

of a customary tenant, will be sufficient to vest the legal freehold in the lord.

Such is the law with respect to the estate of tenant-right in general, but it still remains to investigate the modern condition of some lands avowedly held according to the custom of tenant-right, but which, from peculiar circumstances, can scarcely be considered subject to the above exposition.

It has happened that in the north of England there are many lands which are now in this situation. They were originally granted in the manner we have before described, to tenants in consideration of their services against the Scots, and have descended according to the custom of tenant-right, subject to all the peculiar incidents belonging to that tenure, with respect to dower and descent. This custom is always recognized in all modern deeds and transactions. The ancient mode of alienation seems to have uniformly been by way of customary grant, completed by the appearance of the succeeding tenant at the Court of the Forest to be "sett tenant," on payment of a small nominal fine. The necessity for the peculiar services of these tenants ceased a short time before the union of the two kingdoms, by means of the improved condition of the habits and feelings of society. But the courts, by which these services were regulated, ceased also to be held any longer; and for a long period of upwards of two centuries, the common mode of alienation seems to have still been by deed of grant, which, however, could no longer be presented, and upon the authority of which no change of tenancy could be entered upon record, or any fines be paid, or any acknowledgement of customary tenancy be made. Small annual lords' rents still continue to be paid. The deed of customary grant, many years ago, became to be considered by some to be inadequate to pass the lands in the absence of all form or ceremonies; and though it still continued to be used till within perhaps a very recent period, the mode of alienation by lease and release has been usually substituted, especially as the latter instrument may also take effect under the word grant, according to the ancient mode of customary transfer. There seems to have been very sufficient reason for this change of conveyance, for it was, in a case before referred to, almost doubted by the Court of King's

Bench, whether lands could be aliened by mere customary bargain and sale, even when the title of the purchaser was acknowledged by the lord at the manorial court. A bargain and sale can only pass a use at common law, and a grant is applicable only to an incorporeal hereditament, or to an estate in remainder. But there seems no reason for doubting the efficacy of either instrument as a customary conveyance when the freehold is in the lord. These lands have also been devised like lands of common socage, and fines and recoveries of them have been levied and suffered in the superior courts, or the courts of the county palatine.

Now the question arising from these circumstances is this, whether these tenants are now to be considered to have acquired a freehold tenure in their lands, although they originally possessed only a freehold interest, or whether the freehold is still in the lord? It is submitted, that these tenants have now acquired a freehold tenure, but that the lands are still subject to all the usual customs of tenant-right.

The grounds of this opinion consist in the well-known rule of law relating to the presumption of a release or enfranchisement from the lord. An enfranchisement was, in one case, presumed even against the crown, notwithstanding the old maxim then almost universally prevalent, nullum tempus occurrit regi, and after clear evidence being produced of the lands having been copyhold 170 years ago.[2] It was, on a similar occasion, observed by Lord Kenyon, that he would, if necessary, presume a hundred grants to support a long possession. Now, in the present case, there has been a continued enjoyment of the lands for upwards of two centuries without any reference to the interest of the lord. The tenements have been alienated without the slightest recognition of the right of the lord to complete the title of the tenant by any admittance, or any proceeding which might be considered equivalent to admittance. The lands have even become devisable under the old statute of wills, which does not extend to copyholds, in direct opposition to the ancient custom, but in consequence of the necessity of the case, and the negligence of the lord to hold the usual courts. All transactions relating to transfers

[1] 4 East, 989. [2] Roe dem. Johnson v. Ireland, 11 East, 280.

of any description are completed by the sole acts of the parties themselves. It is no argument to say, that the old mode of alienation by customary grant has been, till recently, adhered to. That assurance formerly derived part of its operation from its presentment, and from the acts of the lord's steward in entering it upon the records of the court. The entire cessation of the military services required by this tenure would not justify the discontinuance of the courts. Many services have virtually ceased, which still exist for the purposes of tenure, in the contemplation of law. The tenure of grand serjeanty abounds with instances of this description. The statute of Charles dispensed with the services of tenant-right, but the courts were still necessary for perpetuating the old relation of lord and customary tenant. The deed of grant depended for its complete validity upon the proceedings taken upon it in the lord's court, for the freehold was originally in the lord; and there are strong grounds for asserting that that instrument could never avail to pass any legal interest in the lands at any period after the courts ceased to be held; although it might of course be supported in equity, as a contract for a valuable consideration. During all this time, therefore, no estate or interest in the lands was ever claimed by the lord; the tenant was not able to pass a legal freehold interest, the old customary estate, through the negligence of the lord; he could pass nothing but a mere equitable interest: the consequence would naturally follow that, in the course of time a grant of the freehold would be presumed to have passed from the lord to the tenant, who would thus be enabled to confer a legal estate of freehold tenure.[1] It may be objected, that the payment of the annual lords' rents, and the modern reference in all deeds to the existence of the custom, would be sufficient to rebut the presumption of law, that the lord had divested himself of the freehold. But it has been distinctly decided, that the reservation of the old rents, and even of suit of court and all royalties, will not prevent a deed from operating to enfranchise the lands.[2]

In the case of some lands of ancient demesne, where the

[1] See Bingham v. Woodgate, 1 Russ. & M. 32; 1 Taunt. 183. And see 3 Russ. 112.

[2] Doe d. Reay v. Huntington, 4 East, 271.

freehold is in the tenant, the reservations of rent have been held to survive as remnants of the ancient seignory, because the estate of the tenant is not changed, and there is no transmutation of possession. But, in our case, the rents would cease to become rents-service, and would continue as quit rents to the former owner of the freehold.

These lands, therefore, would seem to be in this condition. Their tenants have acquired in them a freehold tenure, as well as a freehold interest, and they will be attended with all the liabilities, privileges, and immunities of common freeholds. They have gained this character by a two-fold operation. The freehold has shifted by operation of time and circumstances, from the lord to the tenant. But this alone would not have sufficed to reduce them absolutely to the condition of lands in common socage. The tenure would then only be in the same state as that by knight service, to which it would bear a very close resemblance. The statute of Charles converted both tenures equally into the tenure of common socage. By that statute, the services were abolished, the rents became rent-charges, the old feudal relation was dissolved, and the tenant became the terre-tenant of the land, in the capacity of a common freeholder.

It must not, however be supposed, that these lands are exempt from the peculiar customs which have hitherto continued to distinguish them. Such would of course have been the case if the lands had been expressly released or confirmed to the tenant freed from the customs, though subject to the rents, as in Doe v. Huntington. The customs would then have become entirely extinguished. But, in the present case, no presumption can so far supply the express operation of a deed. On the contrary, the customs are universally acknowledged, and the lands are enjoyed and transferred with direct reference to their existence. It may have been the necessary result of circumstances to change the quality of the estate, but these circumstances do not extend to disturb a custom so long established as to be described as one "whereof the memory of man is not to the contrary." The peculiar customs of gavelkind and borough English, where the lands are equally of the tenure of common socage, rest upon the same foundation of immemorial usage. A contrary doctrine would disturb many

arrangements and transactions with respect to these lands which have been implicitly relied on for the security of both possessors and purchasers.

It may be observed, that as these tenant-right estates were not devisable by custom or at the common law, like ordinary copyholds, no advantage was derived by their owners from the act 55 Geo. III. c. 192. This most inconvenient grievance is now effectually remedied by the late Statute of Wills, 1 Vict. c. 26.

Much difference of opinion has from time to time prevailed with respect to the right of voting at elections by the owners of customary freehold estates. This difference seems to have arisen from the doubt whether the statutes of 8 Henry VI. c. 7, and 18 Geo. II. c. 18, required a freehold *interest* or a freehold *tenure*. The words in these acts require a "freehold" and "freehold estate," to the amount of 40*s*. a year. It has been seen that, in most cases of tenant-right, the owner has not a freehold tenure, but only a freehold interest. It was elaborately argued by Sir W. Blackstone, that the above statutes required a freehold tenure, and that a contrary opinion would entitle copyholders in fee to vote who had equally a freehold *interest*. The legislature does not appear to have coincided with the argument of that learned writer, for an act was afterwards passed, 31 Geo. II. c. 14, which simply anticipated the consequences pointed out by him, and by which all tenants holding by copy of court roll were disqualified from voting. After this statute, customary freeholders in different parts of England have been admitted to vote, even when their estates have passed by surrender and admittance. It may be observed, however, that the late act, 2 Will. IV. c. 45, may be said to deny the validity of this practice, for it is enacted, that any person seised of any lands of copyhold or any other *tenure* whatever *except freehold*, of the annual value of £10, shall be allowed to vote. It would certainly seem to be the intention of this statute, that when the tenant has not a freehold *tenure*, he will be required to have lands to the annual amount of £10.

W. B.

ART VI.—HINTS AS TO THE EXAMINATION OF WITNESSES.

1. *Hints to Witnesses in Courts of Justice.* By a Barrister. London: 1815.
2. *Quintilian's Institutes of Oratory, Book 5, Chap. 7, concerning Witnesses; containing his Rules for their judicious Examination and Cross Examination. Translated with Notes, &c.* By William M. Best, Esq. of Gray's Inn, Barrister at Law. London: 1836.

The treatment of some of the witnesses (neither the most reputable or disinterested of mankind) at Courvoisier's trial, has been the means of giving shape, body and expression to a grievance, or supposed grievance, time immemorial sustained by the public at the hands of the practising members of the bar. Seldom, if ever, within our recollection or in our presence, has the effect of forensic habits on mind and manner been discussed, without some one expatiating on the recklessness with which counsel are wont to wound the feelings of witnesses, though the murmurs were neither general nor loud enough to justify us in volunteering either apology or reproof. At length, however, they have swelled into something very like an outcry, and it becomes necessary to consider whether the profession or their alleged victims are to blame.

The tracts named at the head of this article appear well calculated to throw light on this inquiry, and we have accordingly rescued them from the neglect and oblivion to which on their first appearance they were undeservedly condemned. The first is from the pen of Mr. Baron Field, now judge of the Vice-Admiralty Court of Gibraltar. The second is the chapter to which Blackstone alludes when he speaks of Quintilian as laying down "very good rules for the examination of witnesses *vivâ voce*."

Mr. Baron Field thinks that the annoyance experienced by witnesses is principally attributable to their own awkwardness, confusion, inaccuracy, and conceit; and it may be as well to consider, in the first instance, to what extent this opinion is founded upon truth.

He starts by roundly charging the public with a culpable degree of indifference and consequent inexperience regarding judicial proceedings:

"Ever since it has been my lot to attend courts of justice, I have been of opinion, that he who would devote half an hour to the drawing up of a few *Hints to Witnesses*, who, for the most part, have never been in a court of justice in their lives before, would save those courts a great deal of everlasting admonitory trouble, and would, in that regard, confer no small benefit upon the profession and the public. Whether it proceeds from the smallness and inconvenience of our courts of justice, or from a want of forensic curiosity, I know not; but it is a fact, that in London particularly, nobody goes into a court of justice, unless he has business there. In Ireland, I am informed, the courts are frequently attended by all orders of the public, out of mere rational curiosity, and that it is rare to meet with an Irishman who cannot discuss the talents of the leading barristers. In England, when a man is subpœnaed as a witness, he generally has to make his *debut* in a court of justice; and the bar and the court are put to the never-ending and still-beginning trouble of drilling the witness into a testifying attitude, voice, and phrase; half of which trouble might be saved, if people would but condescend to think they may pick up some useful information in a court of justice, and that there is more common sense in a trial at law than good men would suppose. This absenting themselves from courts of justice is in no case so apparent and flagrant, as when the public are called upon to serve as jurors. For an Englishman, who is liable to act as a juror, never to have been in a court of justice before, (as I have seen many jurors who have not,) is as monstrous as for a Christian never to have been in a church; and I could mention many glaring instances of ignorance in such jurors of the very fundamental principles of the constitution and the dearest rights of Englishmen. If common jurors are taken from a class of society, from which education, and reading upon the subject of trial by jury, must not be expected, surely it cannot be too much to ask them to attend the courts now and then, and observe what will be expected of them when it shall come to their turn to act as jurors. This unusedness to be present in a court of justice is in nothing so palpable as in the total ignorance which witnesses betray even of the forms of an oath, as to taking the book in their ungloved right hand and kissing it, or of addressing the judge, whom the vulgar and unhabituated generally call "Sir," instead of "My Lord,"—a mistake quite as ill-sounding and ill-bred as that of the poor ignorant country witness, who calls the barrister "your Lordship." But if witnesses will persist in refusing to go into court till they shall actually receive conduct-money thither, let them at least commute the trouble and time of such an attendance for the sum of one shilling in hand well

and truly paid to my booksellers, before the delivery of these presents, and let them improve the few following well meant *Hints.*"

The reason why English Courts of justice are not attractive is obvious enough. The business is transacted in a quiet, matter-of-fact, unostentatious manner, with strict attention to the subject under discussion. There are no dramatic or melodramatic displays; no shedding of tears, no appeals to Heaven, no premeditated bouts of sparring with witnesses. Even when a cause of the exciting order is set down for trial, it is hardly ever possible to ascertain beforehand when it will actually come on; and a matter of the highest moment, which has been a standard topic in the newspapers for weeks, may be disposed of, parenthetically as it were, by a mystical telegraphic communication between the bench and the bar, whilst an action for a grocer's bill is going off or one for a linendraper's coming on.

An Irishman lounges into a Court of justice, partly out of sheer idleness, and partly from that affectation of dialectic cleverness which pre-eminently distinguishes him. He has the national character for quickness to support, and attends to take a lesson in repartee or blarney from his favourite "counsellor." But the advantage of the habit, as regards either the administration of justice or the individual, is problematical at best; and we believe it must be admitted, that the use to which an Irishman applies his practical knowledge in this walk, is not to tell a plain story without confusion, but to bother the examining counsel and elicit a roar from the galleries. With all due deference to the Vice Admiralty judge, we prefer the Englishman with his ill breeding and hesitation—his ungloved hand and *Sir*—to the glibness, dexterity and unhesitating effrontery of Pat.

Mr. Field continues:

"I. And, first, I always said that if ever I published such a pamphlet as this, I would place in the very head and front of it, in capital letters, these words—"SPEAK OUT LOUDLY." The experience of the whole bar will unite with me in saying, that the purposes of justice would be better furthered, if these words were even to displace the admonitions against bearing false witness, which are inscribed upon the walls of some of our Courts of justice. There is no phrase so constantly in the mouths of both the bench and the bar as this; insomuch that if the Court finds it necessary to employ

an *usher* to command silence in the spectators, they ought also to employ a sort of *blowpipe* to insure audible utterance in the witness. This lowness of tone in witnesses does not arise so much from diffidence, as from an unusedness to pitch the voice for public speaking. Here is another of the evils of not previously attending the Courts. If witnesses would do so, they would find that whispering, or even conversing, witnesses are no witnesses at all, and might, as the judges are irritated to say every day, *just as well stay at home.* Never having been in a Court of justice before, a witness comes into the box as if the Court were a private room; and when he is asked the first question, which would perhaps inquire into the nature of his Christian name or situation in life, bows and answers in a most well-bred whisper. Now his name and quality are doubtless exceedingly familiar to him; but unfortunately, the judge does not know the various branches and callings of all his numerous family, however "unknown" it may "argue himself." And there are besides twelve gentlemen sitting at some distance, called a *jury*, who form a convenient (not to say a necessary) branch of our Courts of judicature; and, as the counsel iterate all day long, *these gentlemen must hear all that witnesses say.*"

A very useful suggestion, but by no means so easy of practical application as is supposed. A man or woman who has never had occasion to address a formal audience of any kind (and unless the lady belonged to the Society of Friends and had sometimes been moved by the spirit, one does not see how *she* should), is stuck up in an elevated box or pulpit, and expected to detail occurrences, or reply to a series of complicated inquiries, in the precise key and at the exact rate of utterance best adapted for twelve gentlemen in one part of the court to hear, and another gentleman in another part of the court to copy; though the art or habit of carrying on a narration or train of thought in a loud evenly-pitched tone, is one of the grand attainments of rhetoric. Surely, if anything beyond *yes* and *no* is required, those repeated injunctions to speak up must militate sadly against the main object, which we presume to be the elucidation of the truth. A witness may hesitate and even contradict himself, as Lord Listowell and Mr. Charles Ross blushed, from innocent embarrassment; and it is far more important to be able to watch the natural working of the features and inflexions of the voice, than to have a got-up statement clearly recited by an individual duly exercised in

the most approved style of giving testimony, or be bawled at by some unhappy wight reduced by constant goading to the last stage of bewilderment.

We know full well the extent and provoking character of the inconvenience, but it is rather aggravated than alleviated by irritability; and if the witness, instead of being harshly rated at the commencement, were allowed a few moments to recover himself and get accustomed to the sound of his own voice, and were then told quietly that it was necessary to speak louder, the desired object would be much more frequently and much more satisfactorily obtained. Mr. Baron Field, however, will have it that the entire blame lies with the chief sufferers, and endeavours to account for their pertinacity on an hypothesis more ingenious than just.

"II. The great mistake of witnesses, and the chief cause of their not raising their voice above conversation-pitch, is that they will not impress their minds with the conviction that they are called upon to give their evidence as a matter of *business* only. The Court does not sit for the *pleasure* of hearing them converse with the counsel, let the manner and matter of witnesses be ever so interesting. The witness should leave all his bows and undertones in the drawing-room, counting-house, or counter, from whence he came; and should consider himself, from the first moment of his entering the box, as the dictator of necessary and material evidence, to be recorded by the judge who presides at the trial; he should never for a moment suffer himself to forget that his lordship writes down every answer he gives; and therefore when he *bows* to the question, whether his name be John Nokes, instead of proclaiming that 'it is,'—what does he? Can his lordship hear a bow? or if he could, is he to record it among his notes by hieroglyphics? Really those who are to give a verdict upon oath, according to the evidence, must have more than a bowing acquaintance with the facts of the cause."

Pleasure, indeed! We believe nineteen witnesses out of twenty would say with Lord Ellenborough, when an eminent conveyancer asked when it was their lordships' pleasure that he should proceed with his argument—"pleasure is altogether out of the question." They know very well, that they are on serious business, and what is play to others is often death to them. Those bows and undertones generally betoken any thing but gratification or self-complacency.

But there is another bad consequence:

"Besides, if witnesses in Courts of Justice are suffered to degenerate into conversers with barristers, they will be apt to forget that they are testifying upon oath; and though their minds may be sufficiently upright to preserve them from direct falsehood, whether they are speaking upon their oath or not, yet when they are suffered to lose sight that they are bearing witness under a solemn engagement to tell 'the whole truth, and nothing but the truth,' and are permitted to descend into conversation, they will naturally argue and fence, and colour, and conceal, and give way to bias, and blind themselves through interest. It is not in human nature, when off its guard of the sanction of a judicial oath, to refrain from these infirmities; and therefore it becomes important that the witness should never be suffered to forget himself for a moment, by the slightest deviation from an audible tone of responsive deposition. If any proof were wanting of the truth of my remark, as to this conversational mistake of witnesses, I would adduce the phrases 'upon my *honour*,' and 'my dear sir,' which are often in their mouths, and which shew a complete forgetfulness that they are 'giving evidence' upon their *oaths*, and 'to the Court and jury.'"

It is astonishing that so acute an observer, and generally just a thinker, as Mr. Field, should alloy his valuable suggestions by such fallacies. The inference drawn from the casual use of the phrase "upon my honour," is about as conclusive as that drawn by Bishop Thurlow from his brother's frequent appeals to the Redeemer when suffering from the gout, which he adduced as evidences of the Chancellor's belief in Christianity. A strong interest, stimulus, or excitement of any kind, causes conventional forms to be forgotten or disregarded; and we should be the more inclined to believe a witness from his being hurried unconsciously into his habitual tone, manner, and character. In the case of a made-up story, the only chance of eliciting the truth is to make the witness forget himself.

The next suggestion is one which cannot be too frequently impressed.

"III. If witnesses were never to permit themselves to indulge in this conversational style, they would not be so apt, upon adverse or cross-examination, to *fence*, as the practice is called at *the bar*: and one of the most serious and important assurances I would give them is, that they never will gain any thing for their cause or their

credit by this practice. The Court, the bar, and even the jury, are too well used to the artifices of witnesses to be imposed upon for a single moment, by the most dexterous parrying in the world; and a fencing witness will injure his friend's case more by such demeanour than he will benefit it by all the partiality and reserve of his guarded and unwilling evidence. The Court and jury have at least enough of common sense and knowledge of the world to make due deduction from the credit of such a witness; for long experience of the value of vivâ voce testimony has taught them that the *manner* of witnesses is often more important than the *matter;* and their demeanour is always justly taken into consideration and appreciated in estimating their credibility, upon which it is, and not upon the mere strength and extent of their swearing, as it appears upon paper, that the verdict of the jury depends. A witness cannot therefore more effectually damn a friend's case than by *costiveness,* as it expressively called, and pugnacity on the one hand, or by eagerness and overleaping on the other. I remember seeing a pert woman overthrow a whole pile of evidence by a flippant snappishness of the former kind—a fighting with every question; and she flounced about, and looked round for applause at the end of every retort, till Lord Ellenborough told her 'not to throw herself about as if she was in estimation, for there was nobody admiring her.'"

Almost the only recorded instance in which pertness and flippancy met with any positive success or applause, was during the inquiry into the alleged malversations of the late Duke of York as commander-in-chief, when the notorious Mary Anne Clarke played off a succession of airs and impertinencies to the amusement of the younger members, and the occasional confusion of her interrogators.

Courts of justice, however, are constituted very differently from popular assemblies, and a pert flippant witness is pretty sure to throw discredit on the cause—much more what Mr. Field calls a fencing witness, who generally combines dishonesty with conceit. Provincial wits, male and female, are carefully to be eschewed, and we should think little of an attorney's discretion who should insert one of them, without an emphatic note of caution, in a brief. Mr. Field gives a specimen:

"As an example of the latter species of evidence, I would adduce a witness in a horse cause, to prove that the horse was not injured,

who frisked into the box, and before there was time to administer the oath to him, repelled the dignity of being called a veterinary surgeon, by rapping out—'I'm not one of your ranting, flaunting, flaring, harum scarum tearum fellows: I'm one of the old school, taught by nature and experience. The horse is not a glass of gin the worse.' The noble and learned judge here rebuked him for talking of glasses of gin. The witness changed his expression—'I tell you he is not a drop the worse.' Sir William Garrow then examined him—'You are one of the old school?' *Witness*—'Yes; I've known you a long time.'

Of this damning kind are witnesses who prove *too much;* for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort: he leads the witness on from one extravagant assertion in his friend's behalf to another; and, instead of desiring him to mitigate, presses him to aggravate, his partiality, till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the court and jury; and this the advocate knows will deprive his whole testimony of credit in their minds. Such is all that witnesses gain by partiality, by favour and affection, and by combating with truth. He who is not *for* truth is *against* it, and against him will the belief of the jury be shut."

Witnesses of this sort often do an infinity of mischief to the cause, by speculating on the drift of the question or the effect of the answer, which they will then modify in such a manner as, in their opinion, the circumstances may require.

Mr. Field says that the reason most witnesses give their evidence in so slovenly a manner is, that they will not apply their minds to the matter in question, and he seems to think that a good deal of their listlessness and indifference might be cured by making it worth their while to attend. They receive little or no remuneration, and the consciousness of having done their duty is hardly strong enough to compensate for the sacrifice of time and comfort.

"This is a very unpatriotic feeling; and the evil to which it gives birth should be remedied (wherever it can) by a previous examination of his witnesses, on the part of the attorney in the cause. Here is the reason why women and children are so much better witnesses than men: they are seldom called upon to act as such, and business is a rarer thing to them: they, therefore, (particularly children) have a vaster idea of its, and consequently of their im-

portance; and they shall have recalled to mind all the circumstances of their testimony, and shall have ruminated upon what they shall depose, long before they come into court. This is no more than what every witness ought to do; and such a preparation would greatly conduce to the better administration and dispatch of justice."

The truth is, most of the particulars to which witnesses are called to speak made no impression at the time, and the wonder generally is, not that they recollect so little, but that they recollect so much. Moreover, clearness of perception is a very rare quality; and both dates and facts have a strange tendency to mingle and get confounded in the minds of most of us.

Children are good witnesses, because they speak *without* premeditation. Women are not good witnesses, except on topics coming peculiarly within their own sphere of observation; for they do not live and act under the same habitual responsibility for the truth of their statements as men, who are liable at all times to be called to a severe account for an inaccuracy. The author of "The Adventures of an Attorney" agrees with us in both these points: "Of all witnesses in an honest cause, an intelligent child is the best; of all witnesses in any cause, a woman is the worst, unless she happens to be very pretty and engaging, for then she will answer the purpose, whatever it be, most successfully."

Mr. Field repeats the often repeated caution to witnesses.

"Don't tell us, Sir, what he told you."[1]

But as none are more apt to transgress the rule than professional witnesses, it is clear that the transgression is not the result of ignorance, but the perhaps inevitable consequence of men carrying their ordinary modes of expression into the witness box.

The constant war which both judge and counsel are compelled to wage against this habit, not unfrequently presents itself in a ludicrous point of view to the lay spectator, and few of the jokes in Pickwick have told better than his caricature of Mr. Justice Starleigh correcting Sam Weller.

"Now, Mr. Weller," said Serjeant Buzfuz.

"Now, Sir," replied Sam.

"I believe you are in the service of Mr. Pickwick, the defendant of this case. Speak up, if you please, Mr. Weller."

[1] The Pleader's Guide.

"I mean to speak up, Sir," replied Sam; "I am in the service o' that 'ere gen'l'man, and a wery good service it is."

"Little to do, and plenty to get, I suppose?" said Serjeant Buzfuz, with jocularity.

"O quite enough to get, Sir, as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier or any other man said, Sir," interposed the judge, "it's not evidence."

"Wery good, my Lord," replied Sam!

The rest of Mr. Field's pamphlet is occupied with matters of a technical kind, regarding the rights of witnesses to their expenses, the modes of compelling their attendance, &c. &c., which are beside our present purpose, though not unworthy of consideration, when this branch of law comes to be brought under the consideration of the legislature, or of a board authorized to give it the complete revision it is pretty generally admitted to require. At the same time we should find it no easy task to suggest a remedy for the principal defects—the insufficient remuneration for loss of time, and the difficulty of inflicting an adequate penalty for wilful or even fraudulent non-attendance.

In strictness, none but attorneys and medical men can claim a compensation for their time, though a practice has grown up of making other witnesses an allowance on this score. For example, at the last Guildhall sittings, a witness claimed something for loss of time, and Lord Denman so far entertained the claim as to enter into the question of its reasonableness. But such allowances must be jealously watched, or they will rapidly degenerate into bribes. Every body knows that surveyors, and (we regret to add) scientific witnesses, may be had in any quantity, and on either side of any given question of value or opinion, by whoever chooses to bid up to their price.

On the first blush of the question it would seem that the party ought to enjoy the privilege of summoning what witnesses he stands in need of, and that he himself must be the sole judge of the necessity. If he were obliged in each individual instance to prove the materiality of the expected evidence, it is obvious that he might be put to great inconvenience or suffer serious damage; for a prudent litigant will come prepared to meet every combination of circumstances that might reason-

ably be expected to present itself. On the other hand, it is hardly politic to place the time and comfort of any (the most occupied or most distinguished) members of the community at the mercy of any wrongheaded, quarrelsome, or turbulent person who happens to be afflicted with a diseased love of notoriety. We remember one case, a prosecution for blasphemy, in which the defendant, by way of shewing the divided state of opinion on theological subjects, actually subpœnaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived, these found themselves all shuffled up together in the waiting room—the Archbishop of Canterbury and the High Priest of the Jews being of the party. Lord Brougham knew better, and when Mr. Dicas subpœnaed him, stayed away. There was an application for an attachment, but, as it could not be made to appear that he was able to speak to any material point, the court declined to interfere.

Mr. Best was induced to translate Quintilian's chapter concerning witnesses, with the view of supplying a chasm left by law-writers; who, he says, have paid little or no attention to the art of examining witnesses, from an opinion that it can be acquired by practice and experience only. This opinion is better founded than most of those advanced by what are called practical men—a title absurdly enough appropriated by common consent to those who are incapable of generalising; but still something may be done to facilitate the acquirement by laying down rules or suggesting topics; and it is a fact, well worthy of grave reflection, that almost all that can be done in this way has been done by a Roman writer who flourished in the first century of the Christian era. Aristotle's Rhetoric includes nearly every useful precept in oratory; and nearly every useful precept regarding witnesses, which can be laid down beforehand, will be found in this one chapter of Quintilian.

His advice as to the best mode of impeaching their credit is commonplace enough, but throws considerable light on manners.

"But a severer battle is to be fought when the witnesses appear in person. Speeches addressed to the judges, and questions put to themselves, are alike made use of both to impeach their testimony and to support it. First, in speeches, it is usual to declaim both in

commendation of proof by means of witnesses, and in derogation of it. The following are the common places on this subject. It is contended, on the one hand, that no proof can be more satisfactory than the assertions of individuals who depose to facts within their own knowledge; while, on the other, all those temptations and motives, which so often induce men to give false testimony, are enumerated, in order to cause the witnesses, who have been produced, to be disbelieved. We next proceed to impeach the testimony of the witnesses more particularly,—still, however, in such a way, as to include many under one head of objection; for it is well known that orators have at times treated with contempt the evidence of whole nations, and at others condemned entire classes of testimony —such, for example, as hearsays—on the ground that the individuals deposing are not themselves witnesses of the transactions in dispute, but merely repeat the words of others who have not been sworn: again, in prosecutions for extortion, individuals, who swear that they paid the accused the money in question, should be looked on as parties to the cause, and not as witnesses. Sometimes each witness is attacked separately; in most orations where this course is adopted, it is made part of the main defence, but is sometimes the subject of a distinct speech, as it was in the case of the witness Vatinius."

He proceeds to press an injunction of his master, Domitius Afer, whose books are unfortunately lost.

"He most wisely taught his pupils, that every orator should, in this part of his profession, (a maxim which doubtless applies generally,) make it his first care to become familiarly acquainted with all the facts of the case. How this knowledge is to be acquired shall in its proper place be explained. It will supply him with materials for questioning, and, as it were, furnish his hands with weapons. It will also enable him, in his opening speech, to prepare the minds of the judges for the testimony to be produced. For every advocate should in his address comment on the evidence about to be given by his own and his adversary's witnesses, since any statement of facts has weight or not with the person to whom it is given, according as he is predisposed to believe or disbelieve it."

It is astonishing how very few of our best advocates do master their facts, although there is a splendid living example of the extraordinary power that may be acquired by doing so. He, however, ordinarily reserves the knowledge, thus painfully acquired, for his reply, when he brings circumstance after circumstance to bear in a style which cannot fail to inspire the

highest admiration in all capable of appreciating this kind of intellectual excellence. But, in his openings, he certainly errs constantly and we believe wilfully, against the precept of Quintilian,—to prepare the minds of the jury for the coming testimony by commenting on it. Our own impression is, that every material point in the case should be so far touched upon in the opening as to give the desired bias and prepare the jury for the meditated gloss or colouring, but slightly and, if possible, even parenthetically, so as not to suggest topics of defence.

In the Roman tribunal, witnesses were of two classes: such as appeared voluntarily, and such as were summoned by the judges.

"In the case of a voluntary witness, the advocate who introduces him can always know beforehand the testimony he comes to give, and seems, for that reason, to have the easiest task to perform when called on to examine. But even here tact and caution are requisite; and measures must be taken to counteract the effects of timidity, unsteadiness, or indiscretion on the part of the witness, should he display such. For the opposing advocate often succeeds in confounding the witness, and leading him, as it were, into a trap, where, if caught, he does more harm to your cause, than his evidence, given steadily and unshaken, would have served it. Your witnesses should, therefore, be well exercised out of court in the evidence which they are to give, and you should try them with the various questions which are likely to be put to them by the other side; by which means they will either be rendered capable of standing firm when examined in court, or, should they be at all shaken in their testimony, the advocate by whom they were produced can, by a judicious re-examination, regain for them their former credit."

The attorney who understands his business will take good care to put his own witnesses through a trying cross-examination, and would do well to insert in his brief not merely their answers to his questions, but the remarks suggested by their mode of answering. Still it by no means follows that they will tell the same story upon oath; and, as a general rule, we should say that the evidence of the lower order of witnesses turns out weaker, and that of the higher order stronger than was anticipated. The reason is obvious; the lower order, regarding attendance as a holiday, wish to be subpœnaed, and the higher order do not.

The next passage is curious:

"But even though the story our witnesses tell us be consistent in itself, we must still be on our guard against treachery on their part; for we frequently discover that they have been suborned by the opposite party, and, after having promised that their testimony shall be altogether in our favour, tell things on the trial which make the other way, and which they seem to the judges rather to confess than depose to. We should therefore inquire into their reasons for wishing to injure the opposite party; nor should it content us to learn that enmity has existed between him and them; we should ask if that still continues; besides, they might wish to make their conduct on this very trial a means of reconciliation with him; we should also consider if it is likely that they have been bribed, or if, after all, they may not repent of their intention of giving evidence in our favour. But if it is necessary to be on our guard even when our witnesses are only going to depose to facts which really occurred, and which they know, much more is it so when people promise to give false testimony in our favour: for not only are such more likely to repent of their original intention, but there is less reliance to be placed on their promise, and, should they even persevere in their purpose, are more easily overthrown."

This has been frequently adduced to show Quintilian's want of principle and the low state of morality existing amongst the advocates of Rome, who, it is inferred, thought themselves fully at liberty to use the testimony of witnesses who were confessedly hired to swear falsely. Mr. Best can find no better apology for him than one strongly resembling that suggested by a French writer on cookery for M. Corcellet, who was wont to use artificial means to give his geese a liver complaint:

De son estomac il faut distinguer son cœur.

Just so Mr. Best says that we must distinguish between the intellect and the moral sense of Quintilian, and urges that we may benefit by the critic's advice without copying his malpractices.

Great caution is recommended when the witness shows an undue degree of eagerness. The best course then is to avoid putting questions which would bring him directly to the point, and if possible lead him to mix up the required statement with indifferent matters. When once made, no opportunity

should be afforded him for repeating it. Quintilian's notions of cross-examination differ very little from those of a modern practitioner:

"But when the witness you have to deal with is one of those who will not disclose the truth until he cannot help it, the advocate's greatest art is required in order to wring it from him. There is only one way of accomplishing this, which is, by questioning him about matters which lie at a distance. For he will give you such answers as he thinks cannot make against the cause he wishes to favour; then, from the various matters he has thus been got to admit, you may place him in such a situation as to be unable to deny those facts which he is unwilling otherwise to make known. For as in our opening address we frequently bring together scattered arguments,—each of which seems in itself to make nothing against the accused, but, by putting them all together, we prove the fact charged,—so, in like manner, we should ask a witness of this description a great many questions about the circumstances which preceded and followed the main transaction, as also about the time and place of the occurrence, the character of parties, and such like, in order to try to make him light on some answer which will either compel him to confess what we want him to tell us, or contradict what he has said already. Should this not occur, it will then be manifest that he is unwilling to speak about the matter in dispute; and we must then proceed to examine him about others which are extraneous to it, in order to try if we can catch him even in that way. Besides, we should prolong his examination on the material facts of the case, for this reason, that as a witness of this kind will seize every opportunity of colouring his evidence in favour of the accused, even more than is requisite for his exculpation, the judges observing this, will be induced to suspect him, which will have the effect of rendering his examination quite as injurious to the accused as if he had disclosed the whole truth against him."

The present chief justice of the Queen's Bench is reported to have once spoken of "the vulgar practice of cross-examining every witness;" and it must be owned that no practice is more absurd. The majority even of our leading advocates, when they have no materials for cross-examination, no new facts to elicit, and no ground for disbelieving the statement, will notwithstanding persevere in compelling the witness to repeat himself, in the vain hope of pushing him into an inconsistency; though their own observation must have taught

most of them, that trifling discrepancies are uniformly disregarded by jurymen, and that the experiment almost always ends in bringing out the adverse facts more strongly against their clients. The mystic power attached by the public to cross-examination exists only in very rare and exceptional cases.

There is wisdom in the following maxim:

"To pass on to the second case we put; suppose the advocate does not know how the witness is biassed towards the accused; he should endeavour to find this out by a cautious and step-by-step examination, as it is called, and lead him on gradually to the answer he is desirous of eliciting. But inasmuch as artful witnesses are to be met with, who answer at first to your entire satisfaction, in order to be able afterwards to tell what makes against you with the greater appearance of truth, the wary advocate should always dismiss a suspected witness while his testimony is favourable."

The art of stopping at the proper moment is one of the highest moment,—in the speech, the evidence, or the general conduct of a case; for every fresh witness, new question, or additional statement, is a source of peril, and ought not to be lightly hazarded. No first-rate advocate, who has courage and independence enough to act upon his own judgment, will overlay his case; but too many, we fear, act upon the principle frankly avowed by the late Mr. M., who stated that he always made a point to call all the witnesses in his brief. "Did you never lose your cause by so doing?" "Often; but never my client." There is no doubt that clients (both attorneys and parties) are dissatisfied unless their whole array of witnesses are regularly polled out; but, on the other hand, it should be remembered that (taking the narrowest and most interested view of the question) general reputation attracts business, and that general reputation is influenced both by a man's ordinary system of tactics and his success.

"We next proceed" (continues Quintilian) "to consider the course which the defendant's advocate should pursue in his examination. And here the great thing is to know the kind of witness you have to deal with. For if you observe him to be of a timid disposition, work upon his fears; if you see that he is a weak man, try to entrap him; should he be of a passionate temper, get him

into a rage; is he vain-glorious? then puff him up; or, if he appear verbose, entice him on to make him say something inconsistent with his direct testimony; but when you see that the witness is a prudent and steady man, either dismiss him instantly with the insinuation that he is surly and hostile to your cause, or in preference to trying to shake him by examination, throw out some short observation to the Court against his testimony; or if the opportunity present itself, turn him into ridicule by some pleasantry; or if anything can be said against his character, attack his credit with the tribunal by commenting strongly on his misconduct. We sometimes meet with witnesses who to much uprightness of character join great diffidence, and we should not handle them roughly, for such persons may be frequently softened by gentle treatment, when any petulant attack would only exasperate them against us.

"Now the advocate's line of examination may either relate to the matters in dispute, or be directed to extraneous subjects. When of the former class, let him follow the course we have already laid down for the prosecutor, and begin by asking questions about matters which lie at a distance, and can excite no suspicion in the witness as to his object in asking them, and then frame his subsequent questions by the answers given; by which means he will frequently succeed in bringing unwilling witnesses into such a situation as to be able to wring from them what may be of service to his cause. Our schools, it is true, neither give their scholars any instructions, nor require any exercises from them, in this art; and the talent in question is rather the result of natural acutness, or is acquired by practice. But if it be required to give an example of its exercise, I must refer you to the Dialogues of the Socratic Philosophers, and especially those of Plato, where you see such an ingenious course of examination adopted, that although the answers given are for the most part happy enough, still the matter is brought to the conclusion which the interrogating party wished. It sometimes fortunately happens that the account which the witness gives is inconsistent with itself; at other times (and this latter is of more frequent occurrence), different witnesses give irreconcilable statements; but these, which are in general the result of chance, can also be brought about by an ingenious course of examination."

"But above all things the advocate should be circumspect in the way he puts his questions, for witnesses often retort with much repartee, and the feeling of the auditory is in general greatly in their favour. He should also, as much as he possibly can, employ words in common use, in order that the individual under examination (who

is generally an illiterate person) may understand the question, or at least be deprived of the power of saying that he does not, a thing which makes the advocate appear not a little ridiculous."—

We have already said that witnesses who come prepared to show off their wit, generally cut a bad figure; but if they attempt nothing of the sort, and the repartee obviously flows naturally and is suggested by the occasion, it is fatal to the examining counsel; as when Bearcroft, addressing a Mr. Vanzellan—"With your leave, Sir, I will call you for the sake of shortness, Mr. Van." "And with your leave, Sir, I will call you for the same reason, Mr. Bear." Still better, if the retort be unintentional or the result of simplicity, as when Lord Brougham, examining a gentleman as to facts within the knowledge of his wife, asked "Pray, Sir, is Mrs. Thompson here?" "No." "No! I hope Mrs. Thompson is well?" "Quite well, I thank you, I hope Mrs. Brougham is the same." The bystanders assert that the witness spoke with the most perfect *bonhommie;* but if he had studied all his life under Horne Tooke (the only professed puzzler of judges and counsel who succeeded,) he could not have given a more effectual damper to the flippancy of his assailant.

We have reprinted these passages, and connected them with a few random observations of our own, merely in the hope of inducing reflection on the topics; for much more may be suggested than said regarding them. With the general rules or (as the ancient rhetoricians called them) the common places in his mind, the young practitioner will proceed with much greater confidence and effect, than if he had nothing better than his own limited experience for a guide; but nothing short of long observation, and some actual practice in Courts of justice, will enable him to acquire the conventional tact and readiness necessary to bring even the most brilliant natural talents into play. Even the strict technical rules can only be learnt in this manner. Thus a leading question, according to the books, is one which suggests the answer; but such a question is invariably permitted unless it suggests an answer regarding the precise matter in dispute. "I wish that objections to questions as leading might be a little better considered before they are made. In general no objections are

more frivolous." So said Lord Ellenborough, and much time is certainly wasted by not putting leading questions, but the evil cannot be corrected unless a higher degree of mutual confidence can be established amongst the members of the bar. We regret to say, that it would not invariably be safe to suffer a departure from the strict rules of evidence, under the confidence that no unfair advantage would be taken. In fact the eagerness of competition, and the absence of any one acknowledged superior, have introduced an extent of conventional trickery extremely detrimental to the time of the public and the character of the profession. "Win your cause, honestly if you can, but at all events win it," is the word.

A correct knowledge of this rule of evidence, by the way, might be of considerable use to the attorneys (many of them clever accomplished men) who attend the revising barristers' Courts. They constantly begin by asking whether the voter has *occupied*. When the objection does not turn on occupation, the question is allowed; but then they almost always insist on beginning in the same manner when the sole point for decision is, whether the individual has occupied or not. It is quite useless to explain that the question is not simply a leading one, but requires the witness to swear to a legal conclusion. They reply that they have always been in the habit of putting it; and if you persevere in stopping them, they assume a look of injured innocence during the remainder of the day, and probably show you up in the county newspaper for an unconstitutional attempt to limit the franchise.

We have one more caution to add. Both bench and bar ought really to bear in mind that they have no well-founded authority over witnesses, and that they might be made to look exceedingly foolish by a man of clear perceptions and strong nerves, resolved on following his own mode of statement. "Don't tell us *this*, Sir," and "We don't want to hear *that*, Sir," may be all very fine so long as the present vague undefined apprehension can be kept up, but suppose the witness were to turn round and say: "I have sworn to speak the whole truth, and I am ready to do so; but I will not state it in a garbled fashion to please any body; nor give what you call a direct answer, when I know that a false impression might be conveyed by it; nor say that a thing is either black

or white, when in my opinion it is grey." Is there a judge upon the bench who would dare to commit? We rather think not. The prescriptive threat would be found about as formidable as the Speaker's, to *name* the member who should prove contumacious. "And what would happen if you should name me, Mr. Speaker," said an orator who had been somewhat unceremoniously put down during Sir Fletcher Norton's dynasty. "The Lord in Heaven only knows," was the muttered yet distinctly audible reply.

H.

ART. VII.—SUPREME COURTS OF APPEAL.

Observations on the Supreme Appellate Jurisdiction of Great Britain as it is now exercised by the Courts of the Queen in Council and the House of Lords. By William Burge, of the Inner Temple, one of her Majesty's Counsel. London: Saunders and Benning. 1841.

THIS is a clear and able pamphlet, by a gentleman admirably qualified to form a sound opinion on the subject; but it is no discredit to him to say that he has not completely succeeded wherever every other law-reformer has failed. He has given us a full history of the growth of the existing tribunals, traced the causes of the present accumulation of business, lucidly expounded the resulting evil, but done little towards removing the grand difficulty that lies in the way of all the numerous remedies which have been so confidently adduced year after year,—as if the materials for a new court of the highest authority were to be had for the asking. Mr. Burge describes very accurately the sort of tribunal we require, but forgets to tell us where we are to find four or five lawyers, of the first water, thoroughly versed in foreign as well as domestic jurisprudence, to sit in it. He has proved, however, most incontestibly the necessity for doing something,—that, if we cannot get the best, we must put up with the second best, rather than leave matters much longer as they stand.

The jurisdiction is particularly startling from its universality.

"It may be well to pause here, and take a view of the immense jurisdiction of the Privy Council, as a Court of Appeal, the nume-

rous colonies and dependencies which are subjected to it, and the extent of the population, whose rights of person and property, and whose legal and political rights are affected by the manner in which it is exercised. The Anglo-Indian empire contains 100,000,000 of people, subjects to the British Crown. That is,

	Inhabitants.
"The Presidency of Bengal contains .	40,000,000
" Agra " .	38,000,000
" Madras " .	15,000,000
" Bombay " .	7,000,000
Total	100,000,000

"*In Asia*, there is Ceylon, with a population of 1,000,000; and an area 24,644 square miles=11,771,160 acres

"*In the West Indies*, are the colonies of Jamaica, Trinidad, Tobago, Grenada, St. Vincent, Barbadoes, St. Lucia, Dominica, Antigua, Montserrat, Nevis, St. Kitts, Anguilla, Tortola, and the Virgin Isles, New Providence, and the Bahama Islands, St. George's and the Bermuda Isles; the population of these possessions exceeds 1,000,000; they present an area 13,000 square miles=7,720,000 acres.

"*In North America*, there are the Colonies of Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward's Island, Cape Breton, and Newfoundland; with a population of one million and a half of white colonists; area 435,000 square miles, or 279,400,000 acres; and independent of the foregoing, Hudson Bay territories extend over 370,000 square miles.

"*In South America*, are the colonies of Demerara, Essequibo, Berbice, Honduras, and the Falkland Isles. Their population exceeds 120,000; there is an area of 165,000 square miles= 105,600,000 acres.

"*In Africa*, there are the colonies of the Cape of Good Hope, Mauritius, Mahé, and the Seychelles Islands, St. Helena, Ascension, Sierra Leone, the Gambia, Accra, Cape Coast, &c.; with a population of more than 350,000; area 250,000 square miles= 160,000,000 acres.

"*In Australasia*, are the settlements of New South Wales, Van Dieman's land, Swan River, King George's Sound, South Australia, Norfolk Island, &c.; with a population, 120,000; area 500,000 square miles=320,000,000 acres.

"*In Europe*, are the dependencies of Gibralter, Malta, Gozo,

Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Paxo, Cerigo, &c.; with a population of 400,000; area 1,500 square miles= 1,000,000 acres."

By simply recalling the periods at which these colonies were respectively annexed to the British Crown, it will be seen that the jurisdiction has swelled to its present enormous extent within comparatively recent times; and we shall cease to wonder (if any one ever did wonder) at the inadequacy of the original institution to meet the wants of so many and such widely-varying communities. A Court of Appeal, (as is justly remarked by Mr. Burge), "which might have been adequately qualified to hear appeals from the dependencies of Great Britian, when those dependencies consisted only of the Islands of Guernsey and Jersey, became wholly unsuited when they had been so augmented in number and extent over every quarter of the globe."

Lord Brougham's sketch of the mode in which the business was and (with slight modifications in the practice) still is dispatched, will form a fitting corollary or appendix to this estimate.

"All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of such a vast and varied province, is exercised by the Privy Council unaided and alone. It is obvious that, from the mere distance of those Colonies, and the immense variety of matters arising in them, foreign to our habits, and beyond the scope of our knowledge, any judicial tribunal in this country must, of necessity, be an extremely inadequate Court of Review. But what adds incredibly to the difficulty is, that hardly any two of the Colonies can be named which have the same law, and in the greater number the law is wholly unlike our own. All those laws must come, in their turns, in review, before the necessarily ignorant Privy Councillor, after the learned doctors in each have differed. The difficulty thus arising, of necessity from our distance, an unavoidable incident to our Colonial empire, may almost be deemed an incapacity, for it involves both ignorance of the law, and unfitness to judge of the facts. But so much the more anxious should we be to remove every unnecessary obstacle to right judgment, and to use all the correctives in our power. The judges should be men of the largest legal and general information, accustomed to study other systems of law besides our own, and associated with lawyers who have practised or

presided in the Colonial Courts. They should be assisted by a bar limiting its practice, for the most part, to this Appeal Court; at any rate making it their principal object. To counteract, in some degree, the delays necessarily arising from the distance of the Courts below, and give ample time for patient inquiry into so dark and difficult matters, the Court of Review should sit frequently and regularly at all seasons. Because all these precautions would still leave much to wish for, that is no kind of reason why you should not anxiously adopt them. On the contrary, it is your bounden duty, among those countless millions whom you desire to govern all over the globe, not to suffer a single unnecessary addition to the inevitable impediments which the remote position of the seat of empire throws in the way of correct and speedy justice. Widely different are our arrangements. The Privy Council, which ought to be held more regularly than any other Court, sits far less constantly than any, having neither a regular bench, nor a regular bar. It only meets on certain extraordinary days—the 30th of January, the Feast of the Purification, some day in May, Midsummer day, and a few others. I find that on an average of twelve years, ending 1826, it sat in each year nine days, to dispose of all the appeals from all the British subjects in India; from our own civil Courts, to the jurisdiction of which all our subjects are locally amenable throughout the wide extent of the several Presidencies; to dispose of all the causes which come up to the three several native Courts of last resort, the Sudder Adawluts, from the inferior Courts of Zilla and Circuit, comprising all contested suits between the Hindoos, the half-caste people, and the Mahomedan inhabitants. But in the same nine days are to be disposed of all the appeals from Ceylon, the Mauritius, the Cape, and New Holland; from our Colonies in the West Indies and in North America; from our settlements in the Mediterranean, and from the Islands in the Channel;—nine days' sittings are deemed sufficient for the decision of the whole. You are not to suppose that the business of these nine days upon which they sit is all transacted before lawyers; one lawyer there may be, but the rest are laymen. Certainly a right honourable gentleman whom I see opposite to me, is there sometimes by chance, and his presence is sure to be attended with great advantage to us. Occasionally we see him, or my learned friend, his predecessor, (Mr. Abercromby), but this good fortune is rare; the Master of the Rolls alone is always to be seen there, of the lawyers. For the rest, one meets sometimes in company with him, an elderly and most respectable gentleman, who has formerly been an ambassador, and was a governor with much credit to himself in difficult times; and now and

then a junior Lord of the Admiralty, *who has been neither ambassador nor lawyer, but would be exceedingly fit for both functions, only that he happened to be educated for neither.* And such Sir, is the constitution of that awful Privy Council which sits at Westminster, making up for its distance from the suitors, by the regularity of its sitting; and for its ignorance of local laws and usages, by the extent and variety of its general law learning: this is the Court which determines, without appeal, and in a manner the most summary that can be conceived in this country, all those most important matters which come before it. For instance, I once saw property worth 30,000*l.* sterling per annum disposed of in a few minutes after the arguments at the bar ended, by the learned members of the Privy Council, who reversed a sentence pronounced by all the judges in the settlement, upon no less than nineteen days' most anxious discussion. Such a Court, whose decisions are without appeal,—irreversible, unless by Act of Parliament,—is the supreme tribunal which dispenses the law to eighty millions of people, and disposes of all their property."

If any one is anxious to know how many foreign systems it may be incidentally necessary for this tribunal to be acquainted with, we recommend them to run over the table of contents in Mr. Burge's own excellent commentaries on Foreign and Colonial Law. French, Dutch, Danish, Spanish, Italian, Roman, American, Hindoo, Mohammedan, succeed each other in embarrassing variety; and we own we think Sir John Leach quite right, when he refused to sanction Mr. Knapp's Reports, upon the ground that decisions regarding systems of jurisprudence of which the court knew little or nothing, could never acquire authority, and that it was a useless exposure of inevitable and incurable judicial incapacity to publish them. Two curious virtual avowals of this incapacity are mentioned by Mr. Burge. In 1827, an appeal from Demerara, depending on the law of Holland, was referred by the Court to Dr. Van Hall of Amsterdam; and in the same year, the question involved in an appeal from a French colony was referred to two advocates in Paris, whose opinion was religiously abided by. Possibly this mode of decision might be more frequently adopted with advantage to all parties; or regular foreign assessors might be attached to the tribunal.

It is universally allowed, that Lord Brougham's measure of 1833, the Judicial Committee Act, has not succeeded much

better than the noble lord's other pet measure, the establishment of the Court of Review in Bankruptcy. There is no established president, no fixed attendance, no regular bar, and few consequently will disagree with Lord John Russell when he says:

"When I consider the immense importance of this Court, and the number of appeals to it against the decisions of inferior Courts, and that the sitting of the judge is a matter of mere chance and caprice, I certainly think such a state of things discreditable, if not disgraceful, to the empire." [1]

A much higher authority on such subjects, Sir E. Sugden, has remarked,

"No Court of Appeal can act to the satisfaction of reasonable men, unless it is composed, as long as circumstances will permit, of the same persons, whose express duty it is to hear the appeals, and who are responsible for the decisions, nor unless they are presided over by an accomplished lawyer, to whom the profession and the suitors may look up with confidence." [2]

The evils have been freely admitted, and some attempt has been made to remedy them. By the bill called the Administration of Justice in Equity Bill, it was provided that two new equity judges should be appointed, and that the Master of the Rolls, relieved from a portion of the labours of his own court, should become the standing president of the Judicial Committee.

"This provision however did not carry with it the concurrence of the profession or the public. It would necessarily cause a serious interruption to the business of the Rolls' Court. The Court would, it is true, have obtained the assistance of a most eminent judge, whose personal qualities secured him the confidence and respect of the profession, and whose single act of consenting to undertake this additional duty evinced that devotedness to the public service, and that scrupulous and unceasing anxiety for the efficient administration of justice by which his whole professional and judicial career has been distinguished. But the defect in the constitution of this Court would not have been obviated. It would still have been composed of members who continued judges of Courts of original jurisdiction. It would not have possessed the great advantages to be derived from such a constitution as would give to the Court its own judges and its own separate bar."

[1] Lord John Russell's Speech, Mirror of Parliament, August 5, 1840.

[2] Sir Edward Sugden's Letter to Lord Melbourne on the Appellate Jurisdiction, 1835.

It seems also to have been forgotten that, when the Master of the Rolls formerly did the whole duty of this appeal court, he never sat during the evening in his own. But Mr. Burge's chief objection to the measure is, that it would perpetuate an anomaly peculiar to English institutions, the concurrent existence of two courts of ultimate appeal; one of which, he contends, must always acquire greater authority and command greater respect than the other. He dwells, by way of illustration of the disadvantage under which the Judicial Committee labours in this respect, on Dr. Lushington's temporary withdrawal at Sir Frederick Pollock's bidding.

"It is impossible not to be struck with the confirmation which this observation has received from a recent occurrence at that Court. A sufficient number of its members having been convened to decide a very important testamentary cause, a day was appointed for its hearing. For several days preceding, some of the leading newspapers of the day inserted letters and paragraphs containing allusions to the supposed fact, that one of the lords, who it was expected would constitute one of the Court, had been the counsel of one of the parties in the Court below. The day arrived, and about twenty counsel appeared for different parties interested under the testamentary dispositions in question. The leading counsel of one of those parties objected to the learned lord forming part of the Court by whom the cause should be heard, and intimated his intention of withdrawing, if the learned lord should sit. I know not for the dignity of the Court whether most to regret that such a recusation should have been made, or that the judge should have sanctioned it by withdrawing from the Court."

It does not appear to us that the conclusion follows necessarily and immediately from the premises, and we should be inclined to say that the Judicial Committee stands as high in public estimation as its rival; but Mr. Burge proceeds to contend that there ought, *therefore*, to be only one supreme Court, and we quite agree with him as to the superiority such an establishment would possess, and the benefits it would confer, could it be constituted, as he fondly supposes, by a mere *sic volo, sic jubeo* of the legislature.

The plans of several distinguished persons—Lords Cottenham, Langdale, Lyndhurst and Brougham, Sir Edward Sugden and Mr. Lynch, are then described and commented upon. Most of them agree that the proposed Court should consist of

four or five judges, with the Lord Chancellor, under the name of Lord Keeper, to preside. They think that his lordship should retain no original jurisdiction of any sort, but that all the functions of the head of the law should still be concentrated in his person, and, above all, that he should remain a member of the cabinet:

"He would still be," says Lord Langdale, "the King's principal adviser in matters of law, a privy councillor, a cabinet minister, and a great officer of state, responsible in all matters, ministerial and political, which are connected with the custody and use of the great seal. He would still be the head of the law, the connecting medium between the state and the profession; he, as Lord Keeper, would have the nomination of magistrates; and, as I submit to your lordships, should be responsible for the appointment of all judges and judicial officers. It would, my lords, be the duty of the Lord Keeper to conduct and direct inquiries into the state of the law, for the purposes on account of which commissions have lately been appointed—to prepare and bring forward all bills introduced with the sanction and approbation of government—to examine and report upon all bills brought into parliament by individual members of either house—to superintend the general orders from time to time made by Courts of justice for the regulation of practice and pleading; for the alteration of fees, and the regulation of salaries and emoluments in Courts of justice, and it might be made his duty to make annual reports and give information in respect of all such matters to the king's government and to parliament."

So much for the president, but we fear it would be found exceedingly difficult to get a sufficient number of capable assessors; unless, indeed, the government would do what no government has ever done yet,—set aside both political considerations and established usage, and select some of the few able men who (like Mr. Burge, Mr. Miller, Mr. John Austin, &c.) have extended their legal studies a little beyond the bounds of English technicalities.

H.

ART. VIII.—GUARANTEE.—(*Continued from p. 70 of last Number.*)

IN our last number we endeavoured to show, in an article on this subject, to what contracts the statute of frauds applies, and what are the essential properties of an instrument of guarantee. We propose now to take up the two other heads, viz. the construction of a guarantee, and the means by which, irrespective of payment, a guarantee may be vacated or discharged.

A guarantee, it must be first remarked, is to all intents an *agreement* within the meaning of the stamp act, and therefore requires a stamp, if the *matter thereof* be of the value of 20*l.* that is, if it be intended to secure that amount; unless the subject matter be *goods*, and then, whether it be for a past or future supply, the instrument falls within the exemption, as an agreement relating to the sale of goods, wares, or merchandize.[3]

Whether a guarantee for the price of goods to be supplied, or money to be advanced or entrusted to the third party, &c., binds the guarantor to a single transaction only, or to any deficiency which may result from a series of transactions,—in other words, whether the instrument is a *continuing* guarantee or not, is often a question of considerable difficulty. This, like every other question of construction, is of course to be decided by the court, and not left to the jury; and one would have supposed that no difference could have existed with regard to the principle to be applied. The rule that "verba fortius accipiuntur contrà proferentem," seems as properly applicable to this, as to any other species of contract. And such was the opinion of Lord Ellenborough in Merle v. Wells, 2 Camp. 413, the first reported case on the point. The guarantee there was in this form: "I have been applied to by my brother; N. W., jeweller, to be bound to you for *any* debts he may contract, not to exceed 100*l.* (with you) for goods necessary in his business as a jeweller. I have wrote to say, by this declaration, I consider myself bound to you for *any* debt he may contract for his business as a jeweller, not exceeding one hundred pounds, after this date." And it ap-

[3] Warrington v. Furbor, 8 Ea. 242.

pearing that the dealings had gone on for above a twelvemonth between the plaintiff and N. W., and that the latter had, in the course of such dealings, paid the former considerably more than 100*l.*, it was objected that the guarantee had been satisfied. Upon which, Lord Ellenborough said, "I think the defendant was answerable for any debt, not exceeding 100*l.*, which N. W. might from time to time contract with the plaintiff in the way of his business. The guarantee is not confined to one instance, but applies to debts successively renewed. *If a party means to be surety only for a single dealing, he should take care to say so.* By such an instrument as this, a continuing suretiship is created to the specified amount." The next case[1] occurred before Mr. Baron Wood on the Oxford circuit, in which the learned Baron supported the rule of construction laid down in the preceding case by Lord Ellenborough. The guarantee was similar to the last: "I hereby promise to be responsible to Mr. J. M. for *any* goods he *hath* or *may* supply my brother W. P., to the amount of 100*l.*;" and the facts were, that goods considerably beyond the value of 100*l.* had been furnished and paid for since the guarantee was given, and that an amount, exceeding that sum, still remained due. The learned Baron ruled that the defendant was liable, and, upon a motion to enter a nonsuit, the Court of King's Bench was of the same opinion.

It cannot fail to be observed, that in both these cases, the instrument declared on was susceptible of a construction either way. There is nothing on the face of it determining, or even inclining the mind to one way more than the other. It is perfectly reasonable, to suppose that the party giving it in each case (it being evidently his language) meant that his responsibility should be limited to the *first* debt of the amount specified, which the party on whose account it was given should incur. Both were, therefore, cases not only admitting, but calling for, the application of some arbitrary or technical rule of construction, and in both the rule was that which had in all other cases, where the contract was of equivocal import, been invariably adopted, viz., that the words were to be taken as strongly against the party entering into the contract, as the sense of them would admit of.[2] In Bastow v. Bennett, 3 Camp. 220, also,

[1] Mason v. Pritchard, 2 Camp. 436. [2] Id. 12 Ea. 227.

the same rule appears to have been acted on, though considerable stress was laid on the word "any," and though without that word, Lord Ellenborough thought that it might perhaps have been confined to a single dealing. It was in this form: "I hereby undertake and engage to be answerable to the extent of 300*l.* for (any) tallow or soap supplied by Mr. Bastow to F. and B., provided they shall neglect to pay in due time." The case of Melville v. Hayden[1] is the next reported case on the point, and there the Court, though they drew a distinction between it and the cases first quoted, could only, as it seems, justify the decision they came to, by the application of a rule of construction just the reverse of that above mentioned. The language of the instrument was indeed different, but it appears as capable of extension as that of either of the former cases. The words were: "I engage to guarantee the payment of Mr. Amos Moulden, to the extent of 60*l.* *at quarterly account,* bill two months, for goods to be purchased by him of W. and David Melville (the plaintiffs);" the meaning of which may be, either "I guarantee on behalf of A. M. the payment, at the end of a quarter, of such goods as you may supply him with to the extent of 60*l.*"—or, "I guarantee the payment, &c. at the end of *every* quarter" to that amount. The Lord Chief Justice Abbott, however, thought at the time that the guarantee must be construed as referring to a *single* quarterly account, and, it being proved that several quarterly accounts had been settled, directed a nonsuit, which the Court afterwards refused to set aside. "The words 'quarterly account," said Bayley, J. "do not seem to me to vary the case—they only mean that, at whatever time the goods might have been delivered, the account for them should be rendered quarterly." This, it may be observed, has nothing to do with the point. It goes only to the length of credit, leaving the material question untouched. But the learned baron proceeds, "A party who takes a guarantee should carefully provide that there are words in it expressive of its being a guarantee for goods to be furnished from time to time. In the case of Mason v. Pritchard that was the case. The words there were—"for any goods he hath or may supply;" so that there the guarantee was applicable to any goods furnished, at any time, to

[1] 3 B. and A. 593.

the amount of 100*l.*, whatever intervening payments might have taken place. They were therefore equivalent to the words "any goods furnished from time to time." And Best, J. said, "I think the case of Mason v. Pritchard went as far as possible, but that case is distinguishable from the present. There the words were 'for any goods'; here no such expression is to be found. The words 'quarterly account' do not affect this question; they were introduced, as it seems to me, only to prevent the plaintiffs from calling for payment at so early a period as they might otherwise have done, for the goods furnished under the guarantee. *It ought to appear unequivocally,* that it was the intention of the defendant to guarantee Moulden's payments for goods to be furnished from time to time. I cannot collect that from the present guarantee."

In this case it is evident that the Court considered they were not, in construing an equivocal guarantee (for such the one in question must be deemed), to look for words *restrictive,* in order to determine whether it was intended to cover only a single dealing; but that it must be taken as so confined, unless the language plainly imports the contrary. Hitherto every case of a guarantee, which was held to constitute *continuing* liability, contained the word "any," as "any goods" &c.; and it appears to have been the impression that the insertion or omission of such monosyllable determined the whole question. But as, on the one hand, the expression "*any* goods which you may supply" &c. may, apart from any arbitrary rule of construction, reasonably be taken to refer to several purchases, *making together* the amount guaranteed; so on the other, the expression "for goods to be supplied" &c. may with equal propriety be taken to mean a succession of dealings, each to the value mentioned, and to undertake a liability for the ultimate balance. The case next in order accordingly determined that the guarantee was a continuing one, though the word in question did not appear in it, "I do hereby agree," said the guarantor in a letter to the plaintiff, "to guarantee the payment of *goods to be delivered* in umbrellas and parasols to J. S. and E. S., *according to the custom of their trading with you,* in the sum of 200*l.*" The custom, it was found, was for the plaintiff to make up monthly accounts of goods delivered between the 20th of

each month and the 20th day of the next succeeding month, and upon such making up to draw on the customers J. S. and E. S., for the amount of each monthly supply, bills payable at three months' date. The latter sentence therefore was capable of an interpretation both ways—that is, it might have meant to refer to the *time and mode of payment* of one monthly account, or, contemplating a series of monthly settlements, it might have been intended to cover the ultimate account. At all events it was ambiguous, to such an extent as to let in the application of a technical rule. The balance for which the action was brought, it must be remarked, resulted from an aggregate of four several monthly accounts, minus various sums which J. S. and E. S. had paid in the meanwhile, amounting to more than the sum guaranteed. The defendant contended that he was liable only for the first month's account, and which the money paid was more than sufficient to cover. In the decision of the case the Court reverted to the principle laid down by Lord Ellenborough. "The words employed," said Tindal, C.J., "are the words of the defendant in the cause, and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself." And Park, J. observed, "It is useless to refer to the decisions, except for any principle which may be incidentally laid down in them. The only question of principle which has been agitated on the present occasion is, whether these instruments are to be construed strictly, and I am not disposed to hold the doctrine, which has been imputed to Lord Wynford, that a guarantee ought to receive a strict construction." Burrough, J. also said, "these are commercial agreements, and ought to receive a liberal and not a strict construction."[1]

Next in order comes the case of Nicholson v. Paget[2] (the case of Simpson v. Mauley[3] being too clearly a continuing guarantee to admit of question,) in which the Court of Exchequer reverted to the doctrine laid down by Lord Wynford in the case above cited, and held a guarantee in the following form to be restrictive to one transaction: "I hereby

[1] Hargreave v. Smee, 6 Bing. 244. [2] 1 C. & M. 48. [3] 2 C. & J. 12.

agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin, &c. which he receives from you, and I will pay the amount." At the close of the argument Bayley, B. said, "The distinction between the cases on this subject are very nice, and it is desirable, as far as it is possible, to lay down a general rule:" and, after taking time to consider, the Court held that the guarantee had terminated by the payment of 50*l.* "The contract of guarantee," said his lordship, "is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person, and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." And with reference to the case of Hargrave v. Smee above quoted, the Court observed, "the meaning of the guarantee in that case is not, 'if you will supply to the extent,' but 'I will be answerable to the extent;' and the extent of 200*l.* is not to point out the extent to which the goods should be from time to time supplied under that guarantee, but to point out the extent to which the surety will be willing to pay on this as a continuing guarantee." In the conclusion of the judgment the principle of construction is thus expounded: "It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried. The guarantee in this case does not clearly and intelligibly point out to the party giving it to what extent his liability is to be carried." We now come to the last reported case on the subject Mayer v. Isaac,[1] in which the Court of Exchequer again returned to what appears to be the sound principle, and which, considering that all the cases were reviewed and considered, seems likely to become the leading case. The guarantee was in this form: "Sir. In consideration of your supplying my nephew A. L. V. with china and earthenware, I hereby guarantee the payment of any bills you may draw on him on account thereof to the amount of 200*l.*" It is worth

[1] 6 M. & W. 605.

remarking, that prior to the giving the instrument A. L. V. had given his acceptance to the plaintiff for 100*l.* for goods previously supplied, and the defendant had guaranteed the amount of that acceptance. A. L. V. had also become indebted since that period in the further sum of 300*l.*, in consequence whereof the instrument in question was applied for and given. It must also be remarked, that the Court thought it unnecessary to call in aid the principle of construction contended for, considering the intention to undertake for a continued supply to be apparent on the face of the instrument; but the following observations of Alderson, B. clearly show the decision to which the Court would have come had the instrument been deemed less explicit: "There is a considerable difficulty in reconciling all the cases on this subject, arising chiefly from their not being at one as to the principle of decision; some laying it down, that a liberal construction ought to be put upon the instrument in favour of the person giving the guarantee as in Nicholson v. Paget, others that it ought to be strictly construed as in Mason v. Pritchard. Undoubtedly the generally received principle of law is, that the party who makes any instrument should take care so as to express the amount of his liability as that he may not be bound beyond what was his intention that he should be, and on the other hand, that the party, who receives the instrument and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party, and therefore if I were obliged to choose between the two conflicting principles which have been laid down on the subject, I should rather be disposed to agree with that given in Mason v. Pritchard, than with the opinion of Bayley, B. in Nicholson v. Paget." We have thought it desirable to canvass this part of the subject, thus at length, because of its paramount importance in regard to the framing, as well as to the dealing with, and upon the faith of guarantees.

For another purpose the construction put upon an instrument of this kind is justly strict. The transaction between the creditor and the debtor must be precisely that which was contemplated by the surety, otherwise he is not chargeable; *à*

fortiori if there be any fraud or collusive dealing between the two,—if the guarantee be procured for other purposes than those intended by the guarantor he will not be liable.

In the case of Bastow v. Bennet,[1] before mentioned, in which the defendant had guaranteed to be answerable to the extent of £300 for any tallow or soap supplied to T. & B. provided they should neglect to pay in *due time*, it appeared that the supply under the guarantee was at first at a credit of two months, but that after some time, the debtor getting into difficulties, the plaintiffs and the other creditors came to an arrangement with him, by which they were to be paid ready money for all future supplies, but such money was to go in liquidation of the old debts; Lord Ellenborough held that, the goods supplied under this arrangement not being within the scope of the guarantee, the defendant was not liable for them.

The case of Kay v. Groves, 6 Bing. 267, affords a further illustration: the guarantee was for the amount of five sacks of flour to be delivered to W. T. *payable in one month*. On the day after it was given, five sacks were delivered and three days afterwards five sacks more. Five days after the first delivery the vendee sent back three and a half sacks of that portion, as being of a bad quality, and received on the same day an equal quantity in lieu of it. It did not appear that the defendant consented to this substitution or that he ever knew of it, and it was held that he was liable only for the one sack and a half which remained of the first delivery.

In another case, the guarantee was for the payment of £200 value to be delivered to the debtor in pig iron. The defendant had agreed with I. P. one of the plaintiffs, who were partners, as a consideration for his procuring the company to supply him with iron, that he would pay the company the full market price, and ten shillings per ton to I. P. in liquidation of an old debt. This agreement not having been communicated to the defendant at the time when the guarantee was given or the goods supplied, it was holden, that he was not liable at all. "A party giving a guarantee," said Abbott, C. J. "ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility. Here the

[1] 3 Camp. 220.

bargain was, that the vendee should pay beyond the market price of the goods supplied to him ten shillings per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. The effect of that would be, to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt for the payment of which he made himself collaterally responsible. Such a bargain therefore increased his responsibility. That being so, I am of opinion that the withholding the knowledge of that bargain from the defendant was a fraud upon him, and vitiated the contract."[1] So in Evans v. While, 5 Bing. 485, where the plaintiff, who had taken a guarantee from the defendant for "any gold he might supply to E. E. a working goldsmith for the purpose of carrying on his business," discounted bills for E. E., furnishing the amount partly in cash and partly in working gold, deducting from the latter the usual charge for credit, it was holden that the defendant was not liable, for that it was not a supply of gold within the meaning of the guarantee.

On the other hand a guarantee that "if you give T. M. *credit*, we will be responsible," &c., has been holden not confined to the length of credit usually given by the vendee in his trade, or to that which he had been in the habit of giving to the vendor, but to any fair and reasonable credit which the two might agree on.[2] So a guarantee stipulating for six months' credit was holden to be satisfied by an agreement for three months and then a payment by a three months' bill.[3]

The next consideration is, by what means the liability of the party giving such an instrument may be terminated.

The guarantor himself may put an end to it, by giving notice to the creditor that he will no longer be responsible. This is a condition or stipulation incorporated by law into the contract, which is therefore taken to mean "I will be responsible until I give you notice to the contrary." Hence, there seems no necessity that such notice should be in writing. When the option arises,—whether a guarantor, who has bound himself in a sum certain, can thus revoke his contract before credit has been given

[1] Pidcock v. Bishop, 3 B. & C. 605. See also Jackson v. Duchaire, 3 T. R. 551; Glyn v. Herlet, 2 Moo. 134.

[2] Simpson v. Mauley, 2 C. & J. 13. [3] Simmons v. Keating, 2 Star. 426.

to the stipulated amount, has never, we believe, been decided;[1] nor can we find any case in which the question has arisen. Cases may be suggested in which it would be unjust to the creditor to hold, that the party may revoke so as to limit his responsibility to *part* only of the amount; and it does not seem unreasonable so to interpret such a contract as to make it, when once acted on, absolute and irrevocable to that extent. Where it has not been acted on—where the time has not arrived for the goods, &c. to be supplied, it seems reasonable that the guarantor should be allowed to revoke. The same question, it will be observed, may arise as to a restricted guarantee, and it may be that the guarantor may revoke it in toto before any credit has been given, but not afterwards, nor in part.

A guarantee given to a firm, terminates with any change in the constitution of the firm, whether by the retirement of one or more of its members, or by the accession of a new partner, unless a contrary intention appears.[2] Thus, in a recent case, where the business was carried on in the names of M. and D., and the guarantee was addressed to those two persons by name, but it appeared that at the time it was given there was a third partner, it was holden that M. and D. could not recover for any goods supplied by them after such third partner had retired from the business.[3] On the other hand, where the surety gave a promissory note to secure for another a running account with a banking firm, which note was made payable to the firm or *order*, and passed over on every change in the constitution of the house to the new firm, it was holden that the survivors of the old firm, though retired, might sue for the benefit of the new.[4] It was observed, as a material fact in this case, that the defendant did not appear on the face of it to be a surety, but in delivering judgment Bayley, J. said, "A surety bond or instrument may be so framed as to comprehend future as well as present partners." And Littledale, J. observed, with reference to an objection to the parties suing who had ceased to have any interest in the debt, "Although all the securities belonging to the old firm were handed over to the new firm, still the persons entitled to the legal interest in those securities must sue upon them. Suppose that a bond,

[1] See Mason v. Pritchard, 12 East, 227.
[2] Spiers v. Houston, 4 Bl. N. S. 515.
[3] Dry v. Davy, 10 Ad. & El. 30.
[4] Pease v. Hirst, 10 B. & C. 122.

instead of a note, had been given as a security for advances to the members of the firm as they then existed, as well as to any new member of which it might afterwards be composed, the proper persons to sue would be the surviving obligees.

Lastly, if the party entitled to sue on guarantee enters, without the consent of the surety, into a binding arrangement with the principal debtor, to give him further time for payment, or to accept a composition, or does or omits to do any act by or for want of which he has precluded himself from suing the debtor at the time when he would otherwise be entitled so to do, he thereby discharges the surety. Thus if, after the time of credit has expired, he takes a bill from the debtor unknown to the surety, whereby his right of action becomes suspended, he cannot afterwards sue on the guarantee.[1] So if, without the surety's consent, he accepts a composition from the debtor, the result is the same. In the one case, there is what the law deems a fraud on the surety, by reason that his remedy over might have been jeopardised by the delay;[2] in the other a fraud on the debtor himself, because, if the surety were still to remain liable, he would be entitled to recover again from the debtor.[3]

Hence, if this be done with the consent of the guarantor, his liability continues. So, in the case of a composition, if the creditor reserves his remedy against the guarantee, because there is then no fraud on the debtor. And hence mere laches on the part of the creditor to sue the debtor,[4] or the giving him time by way of indulgence, or the taking a bill or other security under circumstances which do not suspend the right of action,[5] forms no defence to a subsequent action on the guarantee. A person who guarantees the due payment of a bill on behalf of the drawer, is in the situation of an indorsee, and is therefore equally discharged by a want of presentment or notice.[6] It has been holden in a modern case,[7] that the creditor, having proved the debt under a fiat in bankruptcy against the principal debtor, does not, by signing his certificate, discharge the surety, though the latter expressly forbid the act, on the

[1] Coombe v. Woolff, 8 Bing. 156; Samuell v. Howarth, 3 Mer. 272.
[2] See Browne v. Carr, 7 Bing. 515. [3] Lewis v. Jones, 3 B. & C. 506. and n.
[4] Trent Nav. Co. v. Searley, 10 Ea. 34. [5] Young v. Edwards 6 Bing. 94.
[6] Philips v. Astling, 2 Taun. 206. [7] Browne v. Carr, 7 Bing. 308.

ground that this was not an act done by the creditor which altered the surety's right without his controul, and scarcely indeed without his assent; that he might by paying the money have prevented the creditor from proving, and might have stood in his place—that, by omitting the only means of preventing it, he may not unreasonably be considered to have assented to the act. And, regarding the signature as a moral duty on the part of the creditor, towards a person who had conformed to the provisions of the act, the Court considered that the exercise of such a power, where the creditor is placed in a condition to exercise it by the laches of the surety, could not be considered as ranging itself under those voluntary acts of the creditor which release the surety.

In the case of a guarantee not under seal, any of the matters of discharge just adverted to afford a defence at law,[1] but where the instrument is a specialty, the remedy of the surety is only in equity.[2]

L.

ART. IX.—ON THE FORM OF MORTGAGES.

THE form of mortgages in this country has continued substantially the same through a long series of years; it in fact does not differ materially from the feoffment on condition referred to by Littleton:[3] and its origin is still evinced by the often repeated but mistaken recital, that upon the non-payment of the debt on the day mentioned in the deed, the estate became absolute at law; an unqualified legal estate having been in the mortgagee from the beginning. The power of sale which has for several years been usually given to the mortgagee is in exact conformity with the doctrine of the civil law[4] and has proved a

[1] Coombe v. Woolff, 8 Bing. 156. [2] Davey v. Prendergrass, 5 B. & A. 187.

[3] Sect. 332.

[4] Under that law, although the mortgage debt was not paid at the stipulated time, it did not amount to a forfeiture of the right of property in the mortgagor. It simply clothed the creditor with authority to sell the pledge and reimburse himself his debt, interest and expences, and the residue of the proceeds of the sale then belonged to the debtor. 2 Story, Eq. Juris, 247. The validity of a power of sale given to a mortgagee was recognized in Croft v. Powell, Comyns, 603, and was found in a mortgage deed dated 17 Jan. 1703. Such a power should not be vested n a trustee. See Anon, 6 Madd. 10.

most beneficial addition, and has seldom given rise to litigation. From the prudence of lenders, the vice of the system, for it is vicious, has not till recently caused much inconvenience. The defect is this; in a court of equity and in practice the mortgagor while he pays the interest of the debt continues apparently and in fact the owner of the estate; and yet in a court of law he has no standing. So long as the mortgagor remains solvent, this gross anomaly is of little importance, for few mortgagees are disposed to manifest their rights and to take upon themselves unnecessarily the management of property from which they can derive no profit; and the apparent ownership of the mortgagor is sufficient to enable him to let and manage the property as he thinks best. But times are changed. From the ardour of speculation on the one hand, and the want of investments for a continual increasing capital on the other, the experience of the last few years has abundantly proved that the present relation between mortgagor and mortgagee is most perplexing and injurious, and notwithstanding the caution and vis inertiæ of conveyancers, the period has arrived when the system must be sifted and the constitution of a mortgagee adapted to the present requirements of the nation. It is a remarkable fact, that till within a few years the estate of a mortgagor, or his power over the property, or the rights and duties of tenants coming in under him, were seldom discussed in our courts. It is true that in the reign of James and subsequently the power of a mortgagor to disseise the mortgagee was considered; but that was firmly denied, though rather on the ground of inconvenience than of principle, and the question was extinguished. It is true also that about the same time the question as to the exact estate or position of a mortgagor with respect to the land was opened out, but it was soon lost sight of, and though lately revived it cannot be said that it is yet determined. These remarks are abundantly proved by a short review of the principal cases.

In a mortgage in fee it was agreed that the mortgagee should not intermeddle with the actual possession of the premises or perception of the rents thereof until default of payment. After the mortgage the mortgagor demised the land to a tenant for six years, and on the determination of the term the tenant gave up the premises to the mortgagor. The mortgagee then

made his will, and his devisee brought ejectment, and it was contended that the demise made by the mortgagor created a disseisin and turned the estate of the mortgagee to a mere right, and after several arguments the Court did not seem to know well how to controvert this argument, but they thought the disseisin, if any, was purged by the re-entry of the mortgagor,[1] "et tandem *pur les inconveniences* que serront introduce in republique per tiel secret contract enter lui et estranger fuit resolve que le devise fait per le bargainee fuit bone." Powseley v. Blackman, 20 Jac. Cro. Jac. 659, S.C. Palmer, 201. It appears that in the above case, after some fluctuation of opinion, it was resolved that the mortgagor, under the agreement above mentioned, was tenant at sufferance and not at will. See S.C. cited Bridg. Judg. by Bannister, p. 488.

In the case of a mortgage for a term, which was transferred several times without the concurrence of the mortgagor, it was contended that after the first assignment the mortgagor became tenant by sufferance, and that his continuance in possession devested the term and turned it to a right; Smartle v. Williams, 1 Salk. 245, S.C. 3 Lev. 387; Skin. 423; Pas. 6 W. & M. B. R.

In Keech v. Hall, A.D. 1778, Doug. 22, it was decided as an entirely new point that a mortgagee might without any notice to quit recover in ejectment against a tenant who came in after the mortgage. But though Keech v. Hall decided that a mortgagee may treat the tenant of the mortgagor as a trespasser, he cannot do so if he recognizes him as tenant of the land; what amounts to such a recognition is of course a question to be decided upon the facts of every case, and thus a wide door is open to litigation. In Doe v. Hales, 7 Bing. 322, A.D. 1831, the mortgagee applied to the tenant of the land to pay the interest, and threatened to distrain for the rent if not paid, and he received interest from the tenant accordingly four or five times; this was held a sufficient recognition. In Doe v. Cadwallader, 2 Barn. & Adol. 473, A.D. 1831, it appeared that the tenant had paid the interest to the mortgagee, but without any demand or threat, and it was held that there was not any recognition.

In Moss v. Gallimore, A.D. 1779, Doug. 266, it was decided

[1] See Holland v. Hatton, Carth. 414; 10 Vin. Ab. 418.

that a mortgagee might, after giving notice of the mortgage to a tenant who came in prior to the mortgage, distrain for all rent then unpaid and due. So in Birch v. Wright, A.D. 1786, 1 T. R. 378, it was held that a mortgagee, after bringing ejectment against a tenant from year to year, who came in before the mortgage, might in an action for use and occupation recover rents due and unpaid down to the day of the demise in the ejectment. So if a tenant is in under an agreement, not a lease, made before the mortgage, the mortgagee, after notice to the tenant, may bring use and occupation; Rawson v. Eicke, 7 Adol. & Ell. 451.

Where a mortgagor is in possession, he may be considered as a tenant as to strangers, Partridge v. Bere, 5 Barn. & Ald. 604; but not as to the mortgagee, Doe v. Maisey, 8 Barn. & Cr. 767. The possession of the mortgagor cannot be deemed adverse to the mortgagee; Hall v. Surtees, 5 Barn. & Ald. 687.

A mortgagor in possession may be ejected by mortgagee without any notice to quit or demand of possession. Doe v. Maisey, 8 Barn. & Cr. 767, A.D. 1828; S. P. Doe v. Giles, 5 Bing. 421, A.D. 1829.

A tenant who comes in after a mortgage may, upon the requisition of the mortgagee, pay all rent then due to him. Pope v. Biggs, 9 Barn. & Cr. 245, A.D. 1829. This case overruled Alchorne v. Gomme, 2 Bing. 54, A.D. 1824; S.P. Waddilove v. Barrett, 2 Bing. New Cases, 538.

Where a lease is subsequent to a mortgage, the mortgagee cannot distrain for the rent nor bring any action for it, Rogers v. Humphreys, 4 Ad. & Ell. 299, A.D. 1835; unless the facts of the case show that the relation of landlord and tenant has arisen between the parties. Here, again, is an ample field for dispute and question. A mere notice from the mortgagee to the tenant and a requisition that the rent should be paid to him is not sufficient, Partington v. Woodcock, 6 Adol. & Ell. 690, A.D. 1837; Evans v. Elliott, 9 Ibid. 342, A.D. 1838. But if the tenant, after such a notice, remains in possession, that may be sufficient, Brown v. Storey, 1 Mann. & Gr. 117, A.D. 1840. Res ipsa loquitur.

This short reference to the authorities shows the alarming extent of the evil; for if so many cases have come before the Courts, how many must have been settled by compromise,

and how much loss and injustice must have been caused! And the breach is not closed; and from the principles enunciated by the Courts the defect cannot be cured by decisions, and no one can wish that recurrence should be had to the legislature, "always at hand," with its obscurities and patent and latent ambiguities. The question, then, is whether the mischief cannot be remedied in foro domestico, in the workshop of the conveyancer. And although the present inconvenience results chiefly from the mortgagee having no definite and certain control over the actual tenants of the property who came in after the mortgage, we shall do well while seeking a remedy for this evil to consider whether the system of mortgages in other respects is not capable of improvement. The object should certainly be that so long as the money of the mortgagee is safe and his interest regularly paid, the mortgagor should remain owner of the land both in Chancery and in a Court of Law; and that when the debt is discharged the security should cease. This, in fact, is the aim of the civil law and of the English chancery. "In the civil law, when a mortgage is executed, the debt intended to be secured by it is considered to be the principal, and the securities are considered as adjuncts, depending for their existence on the existence of the debt. The consequence is, that when the debt is discharged, the securities, and all the estates, interests, liens and charges created by them are extinguished."[1] We think this may in a great measure be effected; and fairly to grapple with all the difficulties, and to show the improvements which may be attained, we will give a new form of mortgage, and append some observations on the respective parts.

THIS INDENTURE, made the 14th day of August, in the year 1841, between John Gray, of the borough and county of Newcastle-upon-Tyne, gentleman, of the first part, and Tobias Scott and Luke Kipley, both of the same place, gentlemen, of the second or other part. WHEREAS the said Tobias Scott and Luke Kipley have, at the request of the said John Gray, agreed to lend him the sum of 2000*l.* upon having the repayment of the same with interest secured in manner hereinafter expressed: And whereas by indentures of lease and release, bearing date respectively the 14th and 15th days of September,

[1] Butler's note, Co. Litt. 205, a.

1832, the release being made between Thomas Low, therein described, of the first part, the said John Gray of the second part, and Stephen Twist, therein described, of the third part, the messuages and closes or parcels of ground and hereditaments hereinafter described and expressed to be hereby appointed and assured were conveyed to the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes as he the said John Gray by any deed or deeds should from time to time or at any time appoint: And in default of and until such appointment, to the use of the said John Gray and his assigns during his natural life, without impeachment of waste; and after the determination of that estate by any means in his lifetime, to the use of the said Stephen Twist and his heirs during the natural life of the said John Gray, in trust, nevertheless, for him and his assigns; and after the determination of the estate so limited in use to the said Stephen Twist and his heirs as aforesaid, to the use of the said John Gray, his heirs and assigns for ever. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of 2000*l.* of lawful British money to the said John Gray paid by the said Tobias Scott and Luke Kipley on the execution of these presents, the receipt of which sum the said John Gray doth hereby acknowledge, and of and from the same doth hereby acquit and release the said Tobias Scott and Luke Kipley, their heirs, executors, administrators and assigns, the said John Gray doth hereby for himself, his heirs, executors and administrators, covenant with the said Tobias Scott and Luke Kipley, their executors, administrators and assigns, that he the said John Gray, his heirs, executors, administrators or assigns, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the said Tobias Scott and Luke Kipley, their executors, administrators or assigns, the sum of 2000*l.* sterling, on the expiration of six calendar months next after the day of the date[1] of these presents, together with interest for the same in the mean time after the rate of 5*l.* for every 100*l.* by the year, without any deduction whatsoever: And further, that in case the said principal sum of 2000*l.* shall not be paid at the time lastly mentioned, then shall and will

[1] It is desirable to leave as few blanks in a draft as may be.

thenceforth on demand, until the repayment thereof, pay interest for the same after the rate aforesaid: And further, that the said Tobias Scott and Luke Kipley, their executors, administrators or assigns, or any of them, shall not, either at the time above mentioned, or at any time thereafter, be bound to accept and take the said principal sum, and to release the said John Gray, his executors and administrators therefrom, and from the interest thereof, unless he the said John Gray, his heirs, executors, administrators or assigns, shall first give six calendar months' previous notice in writing of his or their intention to pay off the same, such notice to be given to the said Tobias Scott and Luke Kipley, their executors, administrators or assigns, or some or one of them, or left at the usual or last usual place of abode of them or some or one of them: PROVIDED ALWAYS nevertheless, and it is hereby expressly agreed and declared between and by the said parties hereto, that notwithstanding interest for the said principal sum is hereby reserved and made payable at the rate of 5*l.* for every 100*l.* by the year, yet when and so often as during the continuance of this security, half a year's interest, after the rate of 4*l.* for 100*l.* by the year, shall be duly paid for the said principal sum, on the 14th day of February and the 14th day of August respectively in every year, or within the space of twenty days next after the said half-yearly days of payment respectively, the same shall be accepted in lieu and satisfaction of the interest hereinbefore reserved and made payable for the same principal sum as aforesaid. And this indenture further witnesseth, that in further pursuance of the said agreement, and for further securing the said principal and interest monies expressed and intended to be hereby secured, the said John Gray, by virtue of his said recited power, and of every other power, enabling him in this behalf, doth by this deed appoint to the uses hereinafter expressed, and doth also hereby grant and release unto the said Tobias Scott and Luke Kipley, their heirs and assigns, all that messuage or dwelling-house situate in the township of Bolton, in the county of Durham, with the offices, garden and hereditaments thereunto belonging; and also all those closes or parcels of ground situate in the same township, containing together by estimation 100 acres or thereabouts, boundering &c., together &c., and all deeds &c., to

have and to hold the said messuage, closes or parcels of ground, hereditaments, and all and singular other the premises hereby granted and released, or intended so to be, unto the said Tobias Scott and Luke Kipley and their heirs, to the uses following, that is to say, to such uses and upon and for such trusts, intents and purposes, as they the said Tobias Scott and Luke Kipley, or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after his death, shall from time to time, or at any time, by any deed or deeds appoint; and in default of and until such appointment, to the uses expressed and declared of and concerning the same hereditaments and premises in and by the said hereinbefore recited indenture of release, of the 15th day of September, 1832:[1] PROVIDED ALWAYS, and it is hereby declared, that as to such of the said hereditaments and premises as are now or shall at any time hereafter, during the continuance of this security, be in the occupation of the said John Gray, he and his executors, administrators and assigns, shall hold and occupy the same as tenant thereof from year to year, to the said Tobias Scott and Luke Ripley, their heirs and assigns, at and under the yearly rent of 200*l.*, payable by two equal portions, on the 14th day of August and the 14th day of February, in every year, and that they the said Tobias Scott and Luke Kipley, their heirs and assigns, shall have the same remedies for recovering the said rent as if the same had been reserved upon a common lease: AND it is hereby declared, that if and when the said rent of 200*l.* shall be received by the said Tobias Scott and Luke Kipley, their executors, administrators or assigns, or any of them, the same shall be applied, first, in or towards payment of the interest due in respect of the said principal sum of 2000*l.*, and of all costs and expenses which a mortgagee is entitled to have and retain, and then towards payment of the said principal sum: PROVIDED ALSO, and it is hereby further declared, that it shall be lawful for the said John Gray, until an appointment shall be made under the powers firstly hereinbefore limited, or one of them, to demise the said hereditaments and premises, or any of them, from year to year, or for any term of years not exceeding twenty-one years in posses-

[1] Of course if the existing uses are not convenient, new uses should be declared here for the mortgagor.

sion, so only that the best rent be reserved, without fine or premium: PROVIDED ALSO, and it is hereby declared, that every appointment made by virtue of the powers aforesaid shall have relation back to the day of the date of these presents, so as to carry and pass as well all rents and profits due and unpaid, when notice shall be given to any tenant or occupier of the said mortgaged premises not to pay the same to the said John Gray, his heirs or assigns, as all rents thereafter to accrue due, so that the said Tobias Scott and Luke Kipley, their executors, administrators and assigns, may have all usual remedies for the recovery of such rents and profits: Provided always nevertheless, and it is hereby declared, that notwithstanding anything hereinbefore contained, it shall be lawful for the said Tobias Scott and Luke Kipley, their appointees, heirs or assigns, or any of them, either before or after the exercise of the power of sale hereinafter contained, to enter into and upon the said hereby mortgaged premises, or any part thereof, and to evict the said John Gray, and any tenant or other person claiming or to claim by, from or under him, by virtue of the powers aforesaid or otherwise, therefrom, and to determine any lease or leases that may have been granted by the said John Gray under the powers aforesaid: PROVIDED ALSO, and it is hereby declared, that if and when the said Tobias Scott and Luke Kipley, or the survivor of them, or the executors or administrators of such survivor within twenty-one years after his death, shall by some writing indorsed on these presents declare their or his intention to enter upon the said hereditaments and premises hereby mortgaged, or any part thereof, then and immediately thereupon the same hereditaments and premises, subject and without prejudice to the powers of appointment firstly hereinbefore limited, and to any lease or leases that may have been previously granted by the said John Gray, until the same shall be determined as aforesaid, shall remain and be to the use of the persons or person making such declaration, their or his or her heirs and assigns for ever: PROVIDED ALSO, and it is hereby expressly agreed and declared, that if and when the payment by the said John Gray, his heirs, executors, administrators or assigns, or any of them, of the principal and interest monies expressed and intended to be hereby received, shall be acknowledged by a

memorandum or receipt indorsed on these presents, to be signed by the said persons, parties hereto of the second part, or the survivor of them, or the executors or administrators of such survivor, the powers hereinbefore given to the said persons, parties hereto of the second part, and the survivor of them, and the executors or administrators of such survivor, shall cease and determine, but without prejudice to any estate which shall have been previously created by virtue of such powers, or any of them. AND it is hereby declared, that in case the said lastly-mentioned powers, and every of them, shall cease before the said principal and interest monies expressed to be hereby secured shall be fully paid, the same monies shall remain and be a charge on the said hereditaments and premises until the payment thereof: AND it is hereby also declared, that in case default shall be made in payment of the said principal and interest monies expressed to be hereby secured, pursuant to the covenant for payment thereof hereinbefore contained, it shall be lawful for the said persons, parties hereto of the second part, their executors, administrators or assigns, or any of them, to institute and prosecute a suit to foreclose the equity of redemption of the said mortgaged premises, and to have and exercise any remedy or right which a mortgagee can have or exercise in ordinary cases: AND it is hereby agreed and declared that the said Tobias Scott and Luke Kipley shall stand possessed of and be deemed entitled to the principal and interest monies expressed to be hereby secured, and the securities for the same as joint-tenants, as well in equity as at law, so that if they or either of them shall happen to die whilst the said principal and interest monies or any part thereof shall continue upon the security intended to be hereby made, the survivor of them, or the executors, administrators or assigns of such survivor, shall have full power as well to give a receipt for the same as to release the mortgaged premises therefrom, as absolutely and effectually as the said Tobias Scott and Luke Kipley could or might have done: AND the said John Gray doth hereby for himself, his heirs, executors and administrators, further covenant with the said Tobias Scott and Luke Kipley, their executors, administrators and assigns in manner following; that is to say, that he the said John Gray, his heirs or assigns, will at all times

during the continuance of this security insure and keep insured against loss or damage by fire in some public office approved of by the said Tobias Scott and Luke Kipley, or the survivor of them, or the executors, administrators or assigns of such survivor, and in their or his names or name, the messuage and buildings hereby mortgaged in or for the sum of £—— at the least, and in default thereof, that it shall be lawful for the said Tobias Scott and Luke Kipley, or the survivor of them, or the executors, administrators or assigns of such survivor, to effect and keep on foot such an insurance, and all monies expended by them or him in so doing shall on demand be repaid with interest after the rate of 5*l.* for 100*l.* by the year, by him the said John Gray, his heirs, executors, administrators or assigns, and shall until and in default of payment thereof as aforesaid be a charge on the said mortgaged premises; and the policy or policies of every such insurance and all benefit thereof shall be deemed as a further security for the repayment of the said loan of 2000*l.* and interest: AND FURTHER, if default shall be made in payment of the principal and interest monies expressed to be hereby secured or any part thereof respectively, on the expiration of six calendar months next after the day of the date of these presents, that then and in such case, and at any time or times thereafter, and notwithstanding anything hereinbefore contained, and without any further or other authority or consent of or from the said John Gray, his heirs or assigns, or any of them, it shall be lawful for the said Tobias Scott and Luke Kipley, or the survivor of them, or their or his assigns, or other the persons or person for the time being competent to appoint or convey the said hereby mortgaged premises, to sell and absolutely dispose of the same premises, or any of them, or any part or parts thereof respectively, either together or in parcels, and at one time or at several times, and either by public auction or private contract, unto such person or persons, and for such price or prices, and subject to such conditions or stipulations as to title or otherwise, and in such manner in all respects as such persons or person competent as aforesaid shall think expedient, with full power to rescind or abandon any contract, and also to buy in the premises, or any part or parts thereof at any auction or auctions, and afterwards to resell the same premises in manner aforesaid, without being

answerable for any loss which may arise thereby, and also to compel the specific performance of any contract by suit in equity or otherwise, and to perform all acts necessary or expedient for effectuating and completing any such sale or sales, and also to give a sufficient receipt or discharge for the purchase money, which shall absolutely exonerate the purchaser or purchasers from all responsibility on account or in respect thereof, nor shall any purchaser be obliged to inquire whether such default hath been made as aforesaid or otherwise, into the validity, propriety or expediency of any sale which shall be made by such person or persons competent as aforesaid of the said mortgaged premises, or any part thereof: PROVIDED NEVERTHELESS, and it is hereby expressly declared, that before the said mortgaged premises or any of them shall be first advertised or offered for sale under the power hereinbefore contained, three calendar months' previous notice in writing of the intention so to do shall be given by such person or persons competent as aforesaid, or some or one of them unto the said John Gray if then living, or left for him at his usual or last usual place of abode in England or Wales; but it is also declared, that no purchaser of the said mortgaged premises or any part thereof, nor any person claiming through or under any purchaser, shall be bound to ascertain or inquire whether any such notice be given or left as aforesaid, or be in any manner affected by the want of evidence of the delivery thereof: AND it is hereby agreed and declared, that the monies to arise by such sale or sales shall in the first place be applied to pay and satisfy the costs and charges of preparing for and making, and which shall otherwise attend such sale or sales, or which shall be otherwise incurred in or occasioned by the execution of the powers hereinbefore contained, and in the next place in or towards payment of the principal and interest monies charged on the said mortgaged premises as aforesaid, or so much thereof respectively as shall then remain due and unpaid, and all costs and expenses, if any, which shall be incurred in or about the enforcing payment of the said principal and interest monies, or any part thereof respectively, and after the payments and deductions aforesaid, the surplus, if any, of such sale monies shall be paid and applied according to the ownership of the equity of redemption of the said mort-

gaged premises. Here may follow the usual covenants for the title, but there should not be a proviso that the mortgagor may hold and enjoy until default, if he attorns tenant.

Of course the foregoing must only be regarded as a general form; it will require alteration according to particular circumstances. The powers of appointment would not be applicable in the case of leaseholds; but the same end might in many such cases be attained by an underlease, with a proviso for cesser.

REMARKS.—The usual covenant in a mortgage deed is to pay the principal money on a certain day, with interest up to that day, but there is no covenant to pay interest afterwards; and consequently, in an action the mortgagee cannot sue for interest subsequent to the day mentioned in the deed as part of the debt, and he can only recover such interest as damages for the detention of the debt. See 1 Saunders, 201 a, note(*n*); Atkinson v. Jones, 2 Adol. & Ellis, 439. There seems to be no good reason for this incongruity, and it may as well be corrected by an express covenant to pay interest on demand.

It is as well to provide that the mortgagor shall give six months' notice before payment of the debt; it is clear that a mortgagor might, without such a provision, pay off the mortgage on the day named in the deed without any notice whatever, and that case has occurred in practice, and the mortgagee suffered a considerable loss in consequence. The right of the mortgagee to six months' notice previous to a payment of the debt, after the day mentioned in the deed, rests upon what is considered to be the practice or understanding in Courts of Equity; it seems, therefore, better on the whole to establish the right of the mortgagee in this respect by an express agreement.

The validity of the power given to the mortgagees, as thus confined within the term of twenty-one years after the decease of the survivor of two lives in being, cannot be doubted, and its utility is obvious: it gives the party who is entitled to the money power over the security, and may save the expense of a conveyance by an infant heir. It has been objected that a purchaser *coming in* under such a power would not have the benefit of the covenants for title entered into by the mortgagor with the releasee to uses. This notion is not sanctioned by

any decision, and has been denied by an able writer. The same objection would attach to a purchase under the usual power of sale in a marriage settlement.

Where the mortgagor is in the personal occupation of any part of the mortgaged premises, a power to distrain is in many cases of great importance; but a mere power to distrain is not sufficient against an execution creditor, nor perhaps against assignees under a bankruptcy. It is clear that goods taken in execution cannot be distrained; but the statute 8 Anne, c. 14, s. 1, gives a landlord a right to have one year's rent; the statute, however, requires that there should be an existing tenancy. See Hodgson and others v. Gascoigne, 5 Barn. & Ald. 88. Where there is an actual demise at a fixed rent, the mortgagee, in case of bankruptcy, is also entitled to one year's rent. 6 Geo. 4, c. 16, s. 74.

We think the mortgagor should have the power to lease given above; it is scarcely susceptible of any abuse; and should the mortgagee be compelled to resort to his security, it is clearly for his advantage that he should have the option of insisting upon the leases of the mortgagor, with power to recover the rent from the tenant in possession either by action or distress. Assuming the mortgagee should vest the fee in himself by an exercise of his power, a tenant who came in under the mortgagor would still have the first legal estate, and the mortgagee would acquire the reversion expectant upon the demise, and thereby would have power to distrain.

The right of a mortgagee to stipulate that though the mortgagor might occupy as tenant, yet that he, the mortgagee, should have the option of treating him as a trespasser, and of bringing ejectment without any notice to quit or demand of possession, was recognised in Doe v. Olley and another, 4 Jurist, 1084.

The power of sale given to a mortgagee is often prejudiced by an injudicious clause requiring notice, the mortgagee should never be required to give notice to any one but to the mortgagor himself, for the heir at law of the mortgagor may be incompetent to receive such notice, or may be unknown or difficult to be found; and it is impossible for a mortgagee to ascertain all the parties to whom the mortgagor may have assigned or transferred his equity of redemption. The right

then to notice should be personal to the mortgagor, and even in some cases it may be objectionable that such a right should be reserved to him.

We will now consider more minutely the advantages which would result from the proposed mode of limitation.

The mortgagor, so long as he paid the interest, and until the principal money was required, would remain in possession of all his rights as owner of the land; he would be within rules, but still he would have life and powers of acting of which he is wholly deprived by a conveyance in fee simple.

When he paid off the mortgage debt, no reconveyance would be required; the power of the mortgagee would cease by a simple receipt. This would be very important in practice, and it would save much expense: it would, however, tend to increase the number of regular mortgage transactions, and to diminish the frequency of mortgages by deposit of deeds. In case of the death of the mortgagee there would be no inquiry as to his heir at law or devisee of mortgaged estates; the parties to receive the money, his personal representatives, would be competent to release.

The personal representative of a mortgagee alone would be competent as well to transfer as release a mortgage; and thus the numerous and perplexing questions which arise, whether mortgaged estates do or do not pass by a devise, would be at an end.

The mortgagee might easily invest himself with the legal estate if he wished, but that would be seldom necessary; for he might sell the estate and appoint it at once to the purchaser. Of course, if the mortgagor should make any conveyance after the mortgage, it would be divested by an execution of the power vested in the mortgagee; and the grantee might be evicted by the mortgagee, like a tenant who comes in after a mortgage in fee.

W. C. W.

DIGEST OF CASES.

COMMON LAW.

[Comprising 10 Adolphus & Ellis, Parts 3 and 4; 4 Perry & Davison, Part 1; 6 Meeson & Welsby, Part 6; 7 Meeson & Welsby, Part 1; 9 Dowling's Practice Cases, Part 1; and a selection from 9 Carrington & Payne, Part 3: —all cases included in former Digests being omitted.]

ABDUCTION.

Upon an indictment for abduction, on the stat. 9 Geo. 4, c. 31, s. 19, the jury ought not to convict, unless they are satisfied that the prisoner committed the offence from motives of lucre. But if they are not satisfied of that, but find that the prisoner used force to the person of the female, and took her away against her consent, he may be convicted of an assault under the stat. 1 Vict. c. 85, s. 11.—*Reg.* v. *Barratt*, 9 C. & P. 387.

AFFIDAVIT.

1. (*Jurat.*) A rule obtained on an affidavit, the jurat of which is without date, will hereafter be discharged with costs.—*Blackwell* v. *Allen*, 7 M. & W. 146.

2. (*Addition of deponent.*) The following was held to be a sufficient addition:—"A. A. of No. 21, Tokenhouse Yard, in the city of London, notary, clerk to Charles Knight, of the same place."—*Cooper* v. *Folkes*, 9 D. P. C. 46.

AGREEMENT.

(*When collateral or original—Construction of.*) R. having undertaken, by a written contract, to build for the Corporation of Henley a house on a farm occupied by A., engaged S. to do the carpenter's work; and the following agreement was made and signed by R. and S., and witnessed by A.:—"It having been arranged that R. shall build a new house on the farm occupied by Mr. A., it is hereby agreed and understood between the said R. and S., that S. shall do all the carpenter's work, &c. under the inspection and control of the said A., and that the amount of the said work shall be paid by Mr. A. to S. only, and that this agreement shall be his guarantee for so doing." On the same day, A. wrote to S. as follows:—"It having been agreed that R. shall build a new house on the farm occupied by me, and that, by an agreement this day shewn me between you and S. you are to do the carpenter's work, &c., and that the payment, when

done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge:" Held, that S., having done the work, could not maintain an action of indebitatus assumpsit for work and labour against A. for the value of it.—*Sweeting* v. *Asplin*, 7 M. & W. 165.

AMENDMENT.

1. (*Under* 3 & 4 *W.* 4, *c.* 42.) Declaration on a promissory note for 250*l.*, made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs or their order on demand. Plea, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for 250*l.* made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date. There was no proof of any other note between the parties: Held, that this was a variance properly amended at Nisi Prius, under the 3 & 4 Will. 4, c. 42, s. 23.—*Beckett* v. *Dutton*, 7 M. & W. 157.

2. (*Under* 3 & 4 *W.* 4, *c.* 42, *s.* 20.) The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was framed on an alleged general custom, without these exceptions. The judge at nisi prius allowed the record to be amended by inserting these exceptions, and adding averments, that the plaintiff was not dismissed for cause, and did not dismiss himself.—*Read* v. *Dunmore*, 9 C. & P. 588.

APPRAISEMENT. See DISTRESS, 1.

ARBITRATION.

1. (*Award, when repugnant.*) Assumpsit on a retainer to project certain works, and to examine certain bills, with care, skill, and diligence. Pleas, 1, non-assumpsit; 2, a denial of the retainer; 3, that the defendant did use care, skill, &c. in projecting the works; 4, that he did use care, skill, &c. in examining the bills. The cause and all matters in difference were referred by order of nisi prius, the costs of the cause to abide the event. The arbitrator found for the defendant on the 1st, 2d, and 4th issues, and for the plaintiff on the 3d: Held, that the award was good, and was not repugnant; for that the finding on the 3d and 4th issues must be considered as being hypothetical, and for the purpose only of determining the costs of them; and that it could not be inferred, from such finding, that there was matter of difference in respect of work done, other than the work included in the action.—*Duke of Beaufort* v. *Welch*, 10 Ad. & E. 527.

2. (*Certificate of arbitrator, when repugnant.*) In debt for use and occupation, goods sold, &c. to which the defendant pleaded nunquam indebitatus and a set-off, the verdict was entered at nisi prius for the plaintiff, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict should stand, and for what amount, or whether it should be vacated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues: Held, that he had a right to do so, and that the certificate was not inconsistent.—*Williams* v. *Moulsdale*, 7 M. & W. 134.

3. (*Costs.*) A cause was referred to an arbitrator, the costs of the suit being directed to abide the event of the award. The award was in favour of the defendant, who taxed the costs of the cause, which the plaintiff neglected to pay. The court granted a rule for an attachment absolute in the first instance. (3 D. P. C. 39.)—*Daniels* v. *Wealds*, 9 D. P. C. 44.

4. Where a cause in the Exchequer has been referred by a judge's order, and it is part of the order that it shall be made a rule of the Q. B., there is no objection to its being so made.—*Milstead* v. *Cranfield*, 9 D. P. C. 124.

ARREST.

1. (*Order under 1 & 2 Vict. c. 110, s. 3, by whom to be made.*) An application for an order under 1 & 2 Vict. c. 110, s. 3, for a capias to issue against a defendant, cannot be made to the Court at Westminster, but it may be made to a single judge sitting there.—*Bentley* v. *Berrey*, 7 M. & W. 146.

2. (*Under 1 & 2 Vict. c. 110, time for setting aside.*) An application by a defendant, arrested under a judge's order, pursuant to 1 and 2 Vict. c. 110, s. 3, to be discharged on the merits, need not be made before the expiration of the time for putting in bail. *Secus*, if the application is on the ground of irregularity. (5 M. & W. 30.)—*Walker* v. *Lumb*, 9 D. P. C. 131.

ASSUMPSIT.

(*Assumpsit or covenant, when to be brought.*) A declaration in assumpsit recited a deed which had been entered into between the plaintiff and the defendants for the performance of certain stipulated operations in chemistry by the 21st June, 1838, and which might be determined by the defendants upon notice given, in case of the non-fulfilment of the contract by that time: and alleged a subsequent parol agreement between the parties, extending the time for completing the contract to the 21st December, 1838; but it contained no statement of the determination of the deed: Held, on demurrer, that the action was wrongly brought in assumpsit on the parol agreement, and that covenant should have been brought on the original deed.—*Gwynne* v. *Davy*, 9 D. P. C. 1.

ATTORNEY.

1. (*Attorney and client.*) Where an attorney, being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the court refused to enforce the fulfilment of that undertaking by attachment.—*Ex parte Evans*, 9 D. P. C. 106.

2. (*Re-admission—Certificate.*) Where an attorney had omitted to take out his certificate for a year after the expiration of his last certificate, and the last day of that year (November 15), was a Sunday, and on the 16th he applied at the Stamp Office to renew his certificate, but was refused; the court allowed him, he not having practised during the period of his being off the roll, to be re-admitted (on the 17th November) without the usual notices, and without payment of fine or arrears of duty.—*Ex parte Knipe*, 9 D. P. C. 108.

3. (*Articles.*) Where a clerk has been articled to one of the members of a firm, and he covenants to serve him, a service with a partner, after the master's death, is not service under the articles, though the partner was a party to them.—*Ex parte Dalton*, 9 D. P. C. 110.

4. (*Same.*) Where an articled clerk has served his whole period of five years, but has not attained the age of twenty-one years, if he will shortly attain that age,

the court will, under special circumstances, allow him to be examined, although still an infant.—*Ex parte Tebbs*, 9 D. P. C. 151.

5. (*Action on bill—Pleadings.*) In an action on an attorney's bill, under the plea of nunquam indebitatus, it is competent to the plaintiff to shew that a greater amount is due to him than the master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause in which the costs were incurred.—*Beck* v. *Cleaver*, 9 D. P. C. 111.

6. (*Taxation of bill.*) The Court of Queen's Bench will not direct the bill of an attorney for business done in bankruptcy to be taxed by its own officer.—*In re Hawker*, 9 D. P. C. 188.

7. (*Action against, for negligence—Pleadings—Damages.*) Where a plaintiff, in an action against an attorney for negligence in the conduct of a suit, alleges that he was "forced to pay" certain sums in consequence of the defendant's negligence, he can only recover the amount actually paid by him, although he has incurred a liability to a greater amount by reason of the alleged negligence.—*Jones* v. *Lewis*, 9 D. P. C. 143.

8. (*Costs of taxation of bill.*) Where the administrator of an attorney sends in his bill, and, upon a judge's order to tax it, more than a sixth is taken off on taxation, the administrator is not bound to pay the costs of taxation, although he consented to the judge's order being made. (Tidd Pr. 332, 9th ed.)—*Priestley* v. *Gray*, 9 D. P. C. 154.

And see WRIT OF TRIAL, 2.

BAIL.

1. (*In error, payment into Court in lieu of.*) Money having been paid into the hands of the officer of the Court "in lieu of bail, to satisfy the costs in error," the Court refused to retain any portion of it to satisfy a demand made by the adverse party for costs incurred antecedently to the obtaining of the writ of error.—*Gwynne* v. *Collins*, 9 D. P. C. 70.

2. (*For felony, when taken.*) The Court will grant a rule for bailing in the country a party charged with a felony, without the production of an affidavit of his poverty.—*Reg.* v. *Gregory*, 9 D. P. C. 129.

BASTARDY.

(*Order of sessions for costs to putative father, what it must state.*) An order of quarter sessions, made under the 4 & 5 W. 4 c. 76, s. 73, and 2 & 3 Vict. c. 85, ss. 1, 3, requiring the overseers of the poor to pay the costs of the putative father of a bastard, against whom an application has been made, must state the application to the justices in petty sessions, the recognizance to appear at the quarter sessions, and the transmission of that recognizance to the quarter sessions; and these facts cannot be supplied by affidavit.

The order need not state that the mother was settled in the parish applying, or chargeable thereto, or that the consent of the guardians was obtained to the application.—*Reg.* v. *Justices of Hampshire*, 9 D. P. C. 171.

BILLS AND NOTES.

1. (*Plea of accommodation bill, proof in support of.*) The plaintiff having promised to indemnify G. against the consequences of a bailbond which G. had entered into at his request, and G. being forced to make a payment in consequence, it was agreed between the plaintiff and defendant that the plaintiff should obtain

the money by discounting a bill drawn by the plaintiff and accepted by the defendant. The plaintiff sued the defendant on the bill, and the defendant pleaded that it was accepted for the plaintiff's accommodation. Held, that the jury might find for the defendant on this issue, although the plaintiff was not liable on his promise to indemnify, it not being in writing.—*Cresswell* v. *Wood*, 10 Ad. & E. 460.

2. (*Bills of exchange, how far negotiable after satisfaction by acceptor before due—What is payment of a bill—Pleading.*) The drawer of a bill of exchange, before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncancelled: Held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value, before it became due.

A plea, in such action, that the bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied. —*Morley* v. *Culverwell*, 7 M. & W. 174.

CANAL ACT.

(*Construction of.*) Where a canal act enacted, in one clause, that after any land should have been set out and ascertained for making the canal, &c., it should be lawful for all persons seised or possessed of or interested in such lands, to contract for, sell, and convey them to the canal company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c. should be made at the expense of the company, and *enrolled* with the clerk of the peace, and copies thereof, signed by the clerk of the peace, should be evidence: and a subsequent clause enacted, that upon payment of such sum or sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury *in manner therein-before mentioned*, the lands should be vested in the company: Held, that, by reference to the former clause, the contract, in order to vest the lands in the company must be *in writing*; and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company. (2 Bing. N. C. 483.)—*Earl of Harborough* v. *Shardlow*, 7 M. & W. 87.

CERTIORARI.

(*Notice of application—Signature.*) A notice of application for a writ of certiorari, signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough," is sufficiently signed within 13 Geo. 3, c. 18, s. 5. (4 B. & Ald. 289; 3 B. & Adol. 887.)—*Reg.* v. *Solly*, 9 D. P. C. 115.

And see FALSE PRETENCES.

CHARITY. See POOR RATE, 3, 4.

CHURCH RATE. See POOR RATE, 4.

CHURCHWARDENS.

(*Election of—Right of rector to preside.*) The rector of a parish has the right to preside at a vestry held for the election of churchwardens, and also, as president

of such meeting, to grant a poll, if demanded, and to fix the time and place of taking it.—*Reg.* v. *D'Oyly*, 4 P. & D. 52.

COMPUTATION OF TIME.

Where it appeared on the face of a conviction for an offence against the excise laws, that the plaintiff had been summoned on the 20th September to appear before the defendant on the 30th September following, and not appearing on that day, the defendant proceeded to hear evidence, and convicted him in a penalty of 5*l.*; the Court held the conviction to be null and void, and the defendant liable in trespass for issuing a distress warrant, as the excise act (4 & 5 Will. 4, c. 51, s. 19) requires that "ten days' notice at least" shall be given to the party to appear, and the rule is inflexible to construe such limitation of time as ten *clear* days.—*Mitchell* v. *Forster*, 4 P. & D. 150.

CONSTABLE. See WARRANT OF COMMITMENT.

CORPORATION.

1. (*Contract by, when it must be under seal.*) A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. (Com. Dig. Franchise, (F. N. B.), 6 Ad. & E. 829, 846.)—*Mayor, &c. of Ludlow* v. *Charlton*, 6 M. & W. 815.

2. (*Indictment against.*) A corporation aggregate, as a railway company, are liable to be indicted for breaches of duty, such as the non-repair of bridges which it is their duty to repair. If they are indicted in the Court of Queen's Bench they can appear by attorney; but if they are indicted at the assizes, semble that they cannot appear there by attorney, but should apply for a writ of certiorari, and appear by attorney in Queen's Bench; and if they do not, there may be a distress ad infinitum against them.—*Reg.* v. *Birmingham and Gloucester Railway Co.*, 9 C. & P. 469.

And see POOR RATE, 1.

COSTS.

1. (*Of proving documents not admitted.*) An order was made that the plaintiff, who refused to admit certain documents, should pay the costs of proving them, if they should be proved to the satisfaction of the judge at the trial. The judge certified that they had been so proved. The plaintiff was nonsuited, but obtained a rule nisi for a new trial. The Court refused to direct the Master to tax the costs of proving the documents before the rule for a new trial had been disposed of.—*Doe* d *Davies* v. *Davies*, 4 P. & D. 141.

2. (*Costs of the day, what are.*) Costs attending the summoning of a special jury, and of an application to the Court by the defendant to postpone the trial, are not taxable as "costs of the day." And under the head of "costs of and occasioned by the applications to the Court," the Master was held to have properly disallowed costs of consultations antecedent to such applications, and costs of a shorthand writer's notes of discussions in the Court of Chancery on a subject connected with the suit, and upon which the parties were required to report to the Court of law. —*Morgan* v. *Miller*, 9 D. P. C. 51.

3. (*Operation of* 3 & 4 *Vict. c.* 24, *s.* 2.) This statute applies to *all* actions of trespass and trespass on the case: and the Court will not exclude from its operation a case where only 1*s.* damages has been given, for an injury arising from the defendant's negligence, apparently contrary to the justice of the case, the judge who

tried the cause having refused to certify under the statute.—*Marriott* v. *Stanley*, 9 D. P. C. 59.

4. (*Operation of* 3 & 4 *Vict. c.* 24, *s.* 2.—*Certificate under.*) An action on the case for a nuisance to the plaintiff's house by smoke, noise, &c. from chimneys and manufactories of the defendant, is an action brought to try a right, within the operation of the 3 & 4 Vict. c. 24, s. 2, and the damages being under 40*s.*, the judge may certify under that statute, to give the plaintiff costs.

Semble, such certificate should be granted immediately on the termination of the trial.

If an informal entry of such certificate on the record be made by the officer, and signed by the judge immediately after the trial, the judge may afterwards amend the entry.—*Shuttleworth* v. *Cocker*, 9 D. P. C. 76.

5. (*Interlocutory costs—Set-off.*) Where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to recover against the plaintiff interlocutory costs in that action which have not been set off on taxation.—*Beard* v. *M'Carthy*, 9 D. P. C. 136.

And see ARBITRATION, 3; COURT OF REQUESTS; WRIT OF TRIAL, 1.

COURT OF EXCHEQUER.

(*Pre-audience in.*) The Attorney-General, in the Queen's business, has pre-audience in the Court of Exchequer over the Postman and Tubman.—*Reg.* v. *Bishop of Exeter*, 7 M. & W. 188.

COURT OF REQUESTS.

In order to support an application to stay proceedings on a judgment in the Brighton Court of Requests (under statute 3 & 4 Vict. c. 10,) a writ of certiorari must issue to remove the proceedings, the rule for which is absolute in the first instance.—*Franks* v. *Wicks*, 9 D. P. C. 178.

COVENANT.

(*Joint or several.*) By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c.:—Held, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money without joining the other parties beneficially interested.—*Poole* v. *Hill*, 6 M. & W. 835.

And see EXECUTORS AND ADMINISTRATORS.

DEED.

See PRESCRIPTION ACT, 2.

DEVISE.

1. (*Misdescription of tenure of lands.*) A testator by his will devised as follows:—"Whereas it appears to me that one part of my said freehold lands, viz. those lands which I hold in the parishes of W., B. and M. were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of D., as hereditary proprietors of the same, I consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family. I therefore give, bequeath, and devise the freehold lands which I hold in the three parishes aforesaid to" &c. The property which

the testator possessed in the parish of M. was freehold, but that in the parishes of W. and B. was all leasehold, which he had derived from his father's ancestors in the male line: Held, that the leasehold lands in the parishes of W. and B. were sufficiently ascertained by the will, and therefore, though incorrectly described as "freehold," passed under the devise. (1 P. Wms. 286.)—*Doe* d. *Dunning* v. *Lord Cranstoun*, 7 M. & W. 1.

2. (*Power of sale to trustees.*) A testator devised among his children (naming them) one half of his property at his decease, whether in houses, lands or other effects, to be equally divided among them and their heirs according to the judgment of his executors, whom he empowered to sell or dispose of the whole or any part according to their opinion, for the benefit of his children as they severally arrived at the age of twenty-five and not before, unless his executors should think it prudent to divide it before. The testator then gave the remaining half of his property to his wife for her life, and to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children and their heirs: Held, that the power of sale given to the executors extended only to the moiety first devised among the children and their heirs.—*Bragg* v. *Ryland*, 7 M. & W. 59.

DISCONTINUANCE. See FINE.

DISTRESS.

1. (*Appraisement by one broker.*) The stat. 57 Geo. 3, c. 93, regulating the costs of distresses for rent not exceeding 20*l.*, has not repealed the provisions of 2 W. & M. sess. 1, c. 5, so as to make an appraisement by one broker sufficient upon such distress. (6 C. & P. 484, overruling Fletcher v. Saunders, 1 M. & Rob. 375.)—*Allen* v. *Flicker*, 10 Ad. & E. 640.

2. (*Tender of rent after impounding—Bad pleading.*) 1. After distress for rent has been impounded, tender of the rent and charges is too late. (8 Rep. 146 a; 5 T. R. 432; 1 Bing. 341; 1 Campb. 285.)

2. Trespass for entering the plaintiff's dwelling-house, and continuing therein five days, and seizing the plaintiff's goods. The defendant justified under a distress for rent, stating his entry, seizure of the goods, and impounding them on the premises. Plaintiff new assigned that after the defendant entered, and after the plaintiff made a sufficient tender of the rent and charges, and after the defendant ought to have quitted the premises, the defendant remained in the dwelling-house, &c. Plea to the new assignment, traversing the tender. After verdict for the plaintiff, the Court arrested the judgment, on the ground that it did not appear from the pleadings that the tender was made before the goods were impounded, and that the omission was not cured by the verdict; also, per Patteson J. that it did appear from the pleadings that the tender was made *after* the impounding.

3. *Semble*, trespass lies for a wrongful continuance in possession after a distress made, per Lord Denman C. J.—*Ladd* v. *Thomas*, 4 P. & D. 9.

ECCLESIASTICAL COURT.

(*Significavit, by whom to be made.*) The surrogate of the bishop's official principal is not the proper person to signify the contumacy of a defendant in a suit before him as a judge of the Consistory Court; and this, before and after stat. 53 G. 3, c. 127; and where the defendant is taken under a contumace capiendo issued upon such certificate, the Court of Queen's Bench will discharge him out of

custody. (Co. Litt. 134 a; 8 Rep. 68 b; Com. Dig. Excommengement (B 2)). —*Reg.* v. *Jones*, 10 Ad. & E. 576.

EJECTMENT.

1. (*Costs of former ejectment.*) Where the lessor of the plaintiff in ejectment was the son and heir of the lessor in a former ejectment, and claimed under the same title and against the same defendant, but brought his action for different premises, the Court stayed proceedings until the costs of the first action were paid; and this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for nonpayment of such costs. (4 Man. & R. 569.) —*Doe* d. *Heighley* v. *Harland*, 10 Ad. & E. 761.

2. (*Service.*) A declaration in ejectment entitled as of "Trinity Term in the *fourth* (instead of *third*) year of Queen Victoria," was held irregular, and the Court refused to allow judgment against the casual ejector, though it was sworn that service was effected on the 29th October, with notice to appear as of *next* Michaelmas Term.—*Doe* d. *Vincent* v. *Roe*, 9 D. P. C. 43, and see *Doe* d. *Channell* v. *Roe*, ib. 67; *Doe* d. *Newman* v. *Roe*, ib. 131.

3. (*Same.*) Service on the tenant's daughter on the premises, with an acknowledgment by the tenant's wife before the term that the declaration has come to his hands, held sufficient to warrant a rule nisi for judgment.—*Doe* d. *Chaffey* v. *Roe*, 9 D. P. C. 100.

And see LIMITATION ACT.

ESTATE TAIL. See FINE.

EVIDENCE.

1. (*Secondary evidence.*) A witness, called to prove a parol demise from the plaintiff to the defendant, stated that, at the time of making it, the plaintiff looked at written minutes, from which he appeared to read the terms, to which the defendant assented: Held, that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible.—*Trewhitt* v. *Lambert*, 10 Ad. & E. 470.

2. (*Secondary evidence—Shorthand notes—Proof of fine—New trial.*) Where a deed is in the hands of an attorney, who holds it not merely as an attorney, but as a security for money owing to him from his client, and the attorney, being called on a subpœna duces tecum, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.

There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. (2 Atk. 71; 6 C. & P. 206.)

Where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in Court by the defendant's counsel: Held, that a copy of the shorthand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff, in a second ejectment against another party.

Quære, whether such evidence would have been receivable, if the parties to the action had been the same.

Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion

of the Court above, by the consent of both parties: Held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted showed the title to be in the lessors of the plaintiff; as, upon such a reservation, the Court are called upon to decide whether the lessors of the plaintiff are entitled to recover or not.

An examined copy of the record of a fine, levied with proclamations, is as good evidence of the fine as the chirograph itself certified by the officer.

A fine was proved to have been levied of the estate in question in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802 by the conusor of the fine to a purchaser, which stated that the fine was levied to the use of himself in fee. This deed was received without objection on the part of the defendant: Held, that it was good evidence as a declaration of the uses of the fine, although it was not proved that the defendant derived title under the conusor.—*Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.

3. (*Notice to produce, when served.*) Where the commission day at the assizes was on Thursday, and a cause was tried on the following Monday, and on the intervening Saturday a notice to produce was served on the plaintiff's attorney, both the plaintiff and his attorney living in the assize town: Held sufficient.—*Firkin* v. *Edwards*, 9 C. & P. 478.

EVIDENCE IN CRIMINAL CASES.

(*Dying declarations.*) Two days before the death of the deceased, the surgeon told her she was in a very precarious state; on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she should have got better, but as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement: Held, that this statement was not receivable in evidence as a declaration in articulo mortis, for that it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery.—*Reg.* v. *Megson*, 9 C. & P. 418.

EXECUTORS AND ADMINISTRATORS.

(*Covenant against executors for breach of covenant for quiet enjoyment—Admission of executor, how far evidence.*) A declaration in covenant against executors, for a breach of covenant for quiet enjoyment of an estate for life, against all having lawful title from the testator, alleged that the defendants having lawful title entered. The plea traversed that the covenant of testator was broken during the continuance of the said term: Held, that although the plea was demurrable for making such a general traverse, yet, as the declaration was also bad, for not alleging that the defendant entered, having lawful title from the testator, it must be taken that the plaintiff had alleged a sufficient breach in his declaration, and that the averment of lawful title meant mesne title derived from the testator; and that this being so, the plea put the title in issue.

To show the lawful title of the defendants, the plaintiff proved that they had taken possession of the estate, and also proved admissions by one of them, that they held it under a deed of gift from the testator prior to the covenant declared upon: Held, that, as the allegation that the defendants having lawful title entered was not divisible, the plaintiff was bound to prove a joint title in the defendants, and that the admission by one, as to their holding under the deed of gift, was not evidence against the other: Held, also, that although the admission was

made by one of two co-executors, it was not made by him quâ executor, and therefore did not admit a breach of covenant by the testator.

Quære, whether if the admission of the deed of gift had been made by a sole defendant, this would have dispensed with further proof of the deed.—*Fox* v. *Waters*, 4 P. & D. 1.

EXTORTION.

Before the stat. 7 Will. 4 & 1 Vict. c. 55, a sheriff was not entitled to take from a party arrested a larger fee, for detaining him till bail given, than the 4*d.* allowed by stat. 23 Hen. 6, c. 4; and a sheriff's officer taking more was liable to the penalty under stat. 32 Geo. 2, c. 28, s. 1, 12, though he was appointed, by the plaintiff in the original cause, a special bailiff for making the arrest. (6 M. & S. 220; 2 B. & Ald. 562; 5 B. & C. 328; 2 Scott, 189.)—*Plevin* v. *Prince*, 10 Ad. & E. 494.

FALSE PRETENCES.

(*Certiorari.*) The certiorari, in all indictments for obtaining money by any false pretence, is taken away by the 7 & 8 Geo. 4, c. 29, s. 53.—*Reg.* v. *Butcher*, 9 D. P. C. 135.

FINE.

(*Discontinuance of estate by—Formedon.*) By a will, in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue: Held, in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being devested, and the rights of the remaindermen only capable of being enforced by real action.

In such a case the statute 3 & 4 Will. 4, c. 47, s. 38, preserves the right of the remaindermen to bring a formedon. (10 Rep. 96 a; 3 P. Wms. 207; 1 Atk. 9; 2 Wils. 19; 3 Atk. 313; 6 Sim. 21.)—*Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.

FINES AND RECOVERIES' ACT.

(*Amendment of recovery.*) Where the deed to lead the uses is sufficient to cover all the lands intended to be passed, an application to amend the recovery by inserting the name of a parish, under the 3 & 4 Will. 4, c. 74, s. 8, is unnecessary.—*In Re Watkins*, 9 D. P. C. 58.

And see HUSBAND AND WIFE.

FIXTURES.

(*Removal of, by tenant after his term.*) The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor: Held, that they had no right so to remove it, and that the lessor might recover it in trover.

And semble such would have been the case even without such finding of the jury. (2 East, 81; 1 C. M. & R. 275; 2 M. & W. 458.)—*Weeton* v. *Woodcock*, 7 M. & W. 14.

FOREIGN JUDGMENT.

To an action of assumpsit on a decree of the Court of Session in Scotland, the defendant pleaded that he was not, at the time of the commencement of the suit in that Court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of that Court, nor was he, at any time before the pronouncing of the decree, in any manner, according to the course and practice of the said Court, notified, nor did he know of the proceedings, so that he might by himself, his proctor, attorney, or agent, appear or plead, or defend himself in the action, nor did he appear in or to any of the proceedings; whereby the decree was contrary to natural justice, and wholly inoperative and void: Held bad on general demurrer. (4 Bing. 686.)—*Cowan* v. *Braidwood*, 9 D. P. C. 26.

FORGERY.

1. (*Indictment.*) A count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as "a certain forged request for the delivery of goods to one J. R." is sufficient under the statute 2 & 3 Will. 4, c. 123, s. 2.—*Reg.* v. *Robson*, 9 C. & P. 423.

2. (*Same.*) A count in an indictment for uttering a forged deed, described it as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. W. of the one part and D. G. of the other part, purporting to be an underlease by the said R. W. to the said D. G. of certain lands, &c. therein mentioned, subject to the payment of the yearly rent of 8*l.* payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment by the said D. G. to the said R. W. of the yearly rent of 8*l.*: Held sufficient under the stat. 2 & 3 Will. 4, c. 123, s. 2.—*Reg.* v. *Davies*, 9 C. & P. 427.

FORMEDON. See FINE.

HUSBAND AND WIFE.

1. (*Acknowledgment of married woman under 3 & 4 Will. 4, c. 74.*) An affidavit verifying the certificate of acknowledgment made by a married woman under the Fines and Recoveries Act, made by a notary public at Carlsruhe (the commissioner who took the acknowledgment having declined to make an affidavit), held sufficient. (3 Bing. N. C. 293.)—*In re Pearsall*, 9 D. P. C. 46.

2. (*Conveyance by wife without husband's concurrence.*) An affidavit, in support of an application for a married woman to be permitted to convey her interest in an estate without her husband's concurrence, sworn by her sister, stating that she was speechless, was held insufficient; the Court required affidavit that the wife had herself been examined.—*Exp. Williams*, 9 D. P. C. 72.

INDICTMENT.

(*Statement of property in goods.*) Where a party has been convicted of felony and is in prison under his sentence, and his wife continues in the possession of his house and goods, an indictment for breaking into the house and stealing the goods, laying the property in the goods in the queen, may be sustained as to the larceny: but a count for breaking the house and stealing the goods, laying them to be the house and goods of the wife, cannot be supported.—*Reg.* v. *Whitehead*, 9 C. & P. 429.

INSOLVENT.

(*Arrest of, for old debt.*) Where an insolvent, being after his discharge arrested for a new debt, agreed, on A.'s becoming his bail, to give him a bond for 300*l.*, in which amount was included a debt of 80*l.* which had been inserted in the insolvent's schedule: Held, that the insolvent was not entitled to be discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default. (1 C. M. & R. 85.) —*Denne* v. *Knott*, 7 M. & W. 143.

INSURANCE.

(*Life insurance—Payment of premiums by agent of company.*) Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the insurance company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount: Held, first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured; secondly, that as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books, debiting him with the amount, were no evidence of a new agreement between the company and the assured.—*Acey* v. *Fernie*, 7 M. & W. 151.

JUSTICES. See WARRANT OF COMMITMENT; WITNESS, 5.

LANDLORD AND TENANT.

1. (*Debt for double value, what is the subject of.*) Where the plaintiff, being the owner of a woollen mill and steam engine, let to the defendant a room, together with a supply of power from the steam engine by means of a revolving shaft in the room: Held, in an action for double value under stat. 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included. —*Robinson* v. *Learoyd*, 7 M. & W. 48.

2. (*Holding over.*) A. let premises to four persons, B., C., D., and E., for a year certain, ending at Midsummer, 1839; with a proviso that if, a month at least before the termination of the year, a request were made to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director in January, and C. in March, 1839. On the 31st of May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff, on the 23rd, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following, the premises were delivered up to A.: Held, that

the four original lessees were liable to A., in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas.—*Christy* v. *Tancred*, 7 M. & W. 127.

3. (*Notice to quit.*) A notice to quit "on Saint Michaelmas Day," is primâ facie a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time.—*Doe* d. *Willis* v. *Perrin*, 9 C. & P. 467.

4. (*Pleading.*) Replevin. Avowry for 20*l.* as a half year's rent in arrear: Pleas, 1, non tenuit; and 2, as to 2*l.* 10*s.* riens in arrear.

At the foot of the indenture of lease, which expressed the rent of the premises demised to be 40*l.* a year, and before its execution were written the words "The allowance for the roads to be made as usual." These words referred to an allowance (which had been usually made to the tenant of the demised premises) of 2*l.* 10*s.* half yearly, being a sum paid by him to an adjoining occupier for a right of way to the demised premises.

Held, that this allowance was at most a mere covenant, and not an alteration of the rent avowed for, so as to support the plea of non tenuit.

Quære whether payment of the sum mentioned in the allowance supported the plea of riens in arrere.—*Davies* v. *Stacey*, 4 P. & D. 157.

5. (*Fraudulent removal—Order of justices under* 11 *Geo.* 2, *c.* 19, *s.* 4.) An order of magistrates under stat. 11 Geo. 2, c. 19, s. 4, must state the offence to have been committed "wilfully and knowingly," otherwise it is bad. (Cald. 166; 6 T. R. 583; 6 D. & R. 341.)—*Reg.* v. *Justices of Radnorshire*, 9 D. P. C. 90.

And see Fixtures; Limitation Act; Notice to Quit; Stamp.

LEASE. See Stamp.

LEGACY AND PROBATE DUTY.

J. R. by his will, after directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter J. A. P., J. R., J. S., and J. G., his executrix and executors, upon trust, to permit his said daughter to receive the rents and dividends thereof during her life, and after her decease, upon trust, for such person or persons (other than and except J. W. and his relations, M. H. and his relations, and the relations of the late husband of the testator's said daughter, and every of them) in such parts, shares, and proportions, and in such manner and form, as the said J. A. P., whether sole or covert, should by will appoint, and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that in case his said daughter should intermarry with the said J. W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, the said J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and thereby, in exercise of the power under her father's will, she gave 10,000*l.* consols to the descendants of the before named D. R., and gave all the rest of her late father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R. the testator.

Held, 1st, that on the death of J. A. P. a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof.

2ndly, That no probate duty was payable upon the probate of the will of

J. A. P., in respect of the estate and effects bequeathed and appointed by her will. (1 C. M. & R. 530; 6 Sim. 570; over-ruling Attorney-General v. Staff, 2 C. M. & R. 124, and Palmer v. Whitmore, 5 Sim. 178.)

3rdly, That legacy duty was payable in respect of the bequests contained in the will of J. A. P. at the same rate at which it would have been payable if they had been mere legacies given by her, payable out of her own personal estate.—*Platt* v. *Routh*, 6 M. & W. 756.

LIBEL.

1. (*Criminal information against publisher of newspaper for.*) A rule for a criminal information against the publishers of a newspaper libel must be drawn up on reading the newspaper, and the newspaper must be filed; otherwise the Court will discharge such a rule, although properly granted on production of a certified copy from the stamp office, under 6 & 7 Will. 4, c. 76, s. 8, of a declaration by the defendant that he is publisher of a newspaper therein described, and on production of a newspaper corresponding to it, which contains the libel.—*Reg.* v. *Woolmer*, 4 P. & D. 137.

2. (*Publication.*) If the manuscript of a libel be proved to be in the defendant's handwriting, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to shew that the printing and publishing were by the direction of the defendant. (2 Stark. Evid. 454; 1 Ld. Raym. 414; 9 Rep. 59.)—*Reg.* v. *Lovett*, 9 C. & P. 462.

LIEN. See PLEADING, 2.

LIMITATION ACT.

(*Adverse holding by lessee.*) Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred, by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of the 3rd section, which, in the case of an estate or interest in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease.—*Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131.

LIMITATIONS, STATUTE OF.

(*Part payment.*) The plaintiff, an attorney, had done professional business of various kinds for the defendant in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.* were paid to the plaintiff on the production of those receipts. In 1838 the plaintiff delivered to the defendant a bill of costs, amounting to 289*l.*, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for 3*l.*

and 5*l.* cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in Jan. 1839: Held, that the letters given in evidence did not sufficiently shew that the 2*l.* 2*s.* and 10*s.* 6*d.* were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations as to any part of the demand.—*Waugh* v. *Cope*, 6 M. & W. 824.

LUNATIC.

(*Trial of insane prisoner.*) Semble, where to a criminal charge the defence of insanity is set up, if the jury are of opinion that the prisoner did not in fact do all that the law requires to constitute the offence charged, although they also find that he was insane at the time of committing the act, there ought to be a general verdict of not guilty, and the Court have no power to order the detention of the prisoner, under the stat. 39 & 40 Geo. 3, c. 94, s. 2.—*Reg.* v. *Oxford*, 9 C. & P. 525.

MANDAMUS.

1. (*Return to.*) Mandamus to the officers of a parish included in a union formed under 4 & 5 W. 4, c. 76, s. 26, reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum out of the poor-rates collected by them, to the treasurer of the union. Return, that the said supposed guardians were not nor were any of them duly appointed under the provisions of the act, &c.; and that, at the issuing of the writ, the said supposed guardians were not nor were any of them guardians of the poor of the said union: Held, that the return was insufficient, for not distinctly setting forth any defect in the appointment.—*Reg.* v. *Governors of St. Andrew and St. George*, 10 Ad. & E. 736.

2. (*To railway company.*) Where the Court had made a rule absolute for a mandamus to a railway company to proceed to complete their line according to their act of parliament, on affidavits by which it appeared that the company had no intention to proceed with their works, and the writ, which issued in consequence, recited that the company had purchased lands from L. to C., but had made no provision for executing the line from C. to Y.; and that C. S. was the owner of land between C. and Y., through which the line in the plan of the company passed, and that he had required the company to set out the line and to proceed to complete the railway from C. to Y., but the company refused to purchase the lands necessary &c., or to set out and complete the line, and thereupon commanded the company to complete the railway &c.: Held, that the writ was ill, as it contained no averment that the company had given up their design, or that they were not effecting it with all convenient speed, and the Court could make no inference to that effect.—*Reg.* v. *Eastern Counties Railway*, 4 P. & D. 46.

3. (*To trustees of turnpike road.*) Mandamus does not lie to compel the repair of a turnpike road.—*Reg.* v. *Trustees of Oxford and Witney Roads*, 4 P. & D. 154.

And see SESSIONS.

MASTER AND SERVANT.

Where the master has intrusted his servant with the control of his carriage for the purpose of putting it up in a certain place, but the servant, instead of doing so, takes it another way for a purpose of his own, and in so doing negligently injures a person by driving against him, the master is liable for that injury. (6 C. & J. 501.)—*Sleath* v. *Wilson*, 9 C. & P. 607.

MIDDLESEX COUNTY COURT ACT. See WRIT OF TRIAL, 1.

NOTICE TO QUIT.

(*Form of—Given by agent of joint tenants.*) A tenant held a house and land from year to year, the land from the 2nd of February, the house, &c. from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his *present* year's holding: Held, that this was a good notice to determine the tenancy in the spring of 1839; it not being shewn on the part of the tenant that the land was not the principal subject of the holding. (11 East, 498.)

A notice to quit, given by a person authorized by one of several lessors, joint-tenants, determines the tenancy as to all. (1 B. & Adol. 135.)—*Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139.

ORDER OF FILIATION. See WARRANT OF COMMITMENT.

ORDER OF JUSTICES. See BASTARDY.

ORDER OF REMOVAL.

1. (*Notice of appeal against—Statement of grounds of appeal.*) In a notice of appeal against an order of removal, alleging as the ground of appeal a settlement by hiring and service, the general rule is, that the date of the service, as well as the master's name, should be stated, and that a notice omitting such date is bad. But semble, (per Lord Denman, C. J., and Littledale, J.), if it appear that the appellants could not ascertain it, the strict rule may be dispensed with. And the sessions may judge whether, under the circumstances of any particular case, time is so material that the omission to specify it vitiates an examination or notice of appeal. (10 Ad. & E. 688.)—*Reg.* v. *Inhabitants of Bridgewater*, 10 Ad. & E. 693.

2. (*Examination.*) The copy of examinations, transmitted with an order of removal, under the stat. 4 & 5 W. 4, c. 76, s. 79, must shew on the face of it every fact necessary to give the justices jurisdiction to remove. Where the examination does shew all such particulars, and discloses no irregularity, it cannot be objected, on appeal, that the evidence was in fact inadmissible, if the objection was not made known to the justices at the examination. Evidence, therefore, to prove that the party, when examined, was a convicted felon, is irrelevant, if offered as impeaching the examination.—*Reg.* v. *Inhabitants of Alternun*, 10 Ad. & E. 699.

3. (*Appeal—Production of order.*) On an appeal against an order of removal, it is the duty of the appellants to produce the original order; and if it is in the hands of the respondents, the appellants cannot put in evidence the copy which has been served upon them, unless they have given notice to the respondents to produce the original.—*Reg.* v. *Justices of Sussex*, 9 D. P. C. 125.

4. (*Notice of appeal, time for.*) Where a parish gave notice of appeal, under the 4 & 5 W. 4, c. 76, s. 79, against an order of removal, within twenty-one days after service of the order, but did not prosecute the appeal at the next practicable sessions; and the respondent parish did not remove the paupers for a considerable time afterwards: Held, that the appellants might give a fresh notice of appeal when the pauper was actually removed. (3 T. R. 776.)—*Reg.* v. *Justices of Middlesex*, 9 D. P. C. 163.

OVERSEERS.

(*Nomination of, by vestry under local act.*) By a local act, the inhabitants of each district in the parish, in vestry assembled, were to nominate a certain number of

persons to be returned to justices at petty session, who were to select therefrom a certain number to be overseers.

At a vestry meeting for the above purpose, there was a contest as to the persons to be nominated, and after a show of hands a poll was demanded: Held, that the nomination was not necessarily to be confined to the persons present at the meeting, but that a poll might be lawfully had on a future day, so that other persons entitled to vote might take part in the nomination.—*Reg.* v. *Hedger*, 4 P. & D. 61.

OYER.

Where a defendant pleads a deed, and the plaintiff craves oyer, and then, without setting forth the deed, replies non est factum, and adds the similiter for the defendant, and delivers the issue with notice of trial; the defendant may return the issue, and pray that the deed may be enrolled; and if the plaintiff proceeds to trial on the issue as originally delivered, it is irregular, and the Court will set aside the verdict. (2 Str. 1240; 4 B. & C. 741.)—*Smith* v. *Jennings*, 9 D. P. C. 155.

OYSTER FISHERIES.

Dredging for oyster spat in a common navigable river is illegal under 13 Ric. 2, stat. 1, c. 19.

Therefore where the declaration was in trespass quare clausum fregit; plea, that the locus in quo was part of a common navigable river, in which the public had a right to fish, and that defendant entered to fish for oyster spat; replication, that oyster spat was the spawn or young brood of oysters, unfit for the food of man; rejoinder, that the public had the right of fishing for oyster spat in a public river: Held, ill on demurrer.

Quære, if the defendant had pleaded that he took the oyster spat for the purpose of bringing it to perfection?—*Mayor, &c. of Maldon* v. *Woolvet*, 4 P. & D. 26.

PARTNERSHIP.

(*Liability of partners on contract antecedent to the partnership.*) The plaintiff sued three defendants, partners, on a bill of exchange, given in the name of the firm. The contract on which the amount of the bill accrued due was entered into before the partnership of one of the defendants, but a part of the debt, the consideration of the bill, was incurred afterwards: Held, that the plaintiff was entitled to recover against all three defendants for the amount of the debt so incurred after the commencement of their partnership.—*Wilson* v. *Bailey*, 9 D. P. C. 18.

PAYMENT INTO COURT.

(*What is admitted by.*) In indebitatus assumpsit against two defendants for work and labour, with the usual money counts, payment into Court by both defendants only admits their liability to the amount paid in, and leaves them at liberty to dispute their further liabilty. (5 Bing. 28; 5 M. & W. 94; 6 M. & W. 9). *Archer* v. *English*, 9 D. P. C. 21.

PERJURY.

A. was indicted for perjury, alleged to have been committed on the trial of B. for perjury. The indictment against A. alleged that the evidence he gave on the trial of B. was material, and that B. was convicted. It appeared that B. was convicted and sentenced, but that the judgment was afterwards reversed on error:

Held, that this reversal was no ground of defence for A., as showing that his evidence could not have been material, and that it did not negative the allegation that B. had been convicted.—*Reg.* v. *Meek*, 9 C. & P. 513.

PILOT ACT.

Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel, within the meaning of the 6 Geo. 4, c. 125, s. 70. The master of a ship is not, however, precluded by that section from employing any moving power, as, for instance, steam or other power bonâ fide used as a moving power, if upon the party applying such power necessarily devolves the selection of the ship's course, and the charge or conduct of her in that course.

The penalty imposed by the 70th section of the Pilot Act may be sued for by a common informer, and is within the second head of the 76th section. The consent of the Trinity House or Lord Warden is necessary only in the case of pilots licensed by them; but their consent is not required with reference to pilots not within their jurisdiction.—*Beilby* v. *Scott*, 7 M. & W. 93.

PLEADING.

1. (*Statement of demise, when sufficient—Replication de injuriâ.*) To trespass for entering the plaintiff's house and taking his goods; the defendants pleaded that on the 5th November, 1838, and for a long time then past, and from thence until and at the time when, &c. the plaintiff held a certain other house of certain persons (naming them), as tenant thereof to those persons, under a demise before then made by them, upon which demise a certain weekly rent of 7*s.* was reserved to them. The plea then stated that rent was in arrear, and that the goods were seized as having been fraudulently removed from the house demised to the house in which, &c.: Held, 1. That the demise was stated with particularity sufficient to be good on general demurrer. *Quære*, whether the plea was good on special demurrer. 2. That the plea set up the authority of the plaintiff to follow and seize the goods, it being an authority which the law annexed to the contract made by him as tenant, and that the replication of de injuriâ was bad, within the 3d resolution in Crogate's case. (1 C. & M. 500; 3 B. & Ad. 2.)—*Bowler* v. *Nicholson*, 4 P. & D. 16.

2. (*Not guilty in trover, what admissible under.*) Evidence of lien is not admissible under the plea of not guilty in trover. (2 C. M. & R. 1.)—*White* v. *Teale*, 4 P. & D. 43.

3. (*Plea of discharge by plaintiff in assumpsit.*) To a declaration in assumpsit, founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. (Cro. Car. 383; 2 Leon. 214; 1 Mod. 262; 2 Mod. 259.)—*King* v. *Gillett*, 7 M. & W. 55.

4. (*Plea of release—Replication thereto.*) A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. and A. W., alleged that the policy was made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that one T. Z. and the plaintiff A. W., or one of them, were or was then, and from thenceforth until the loss, interested in the goods. To this declaration the defendant pleaded a release by D. W. for himself and his partner A. W. The plaintiffs

replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the parties was to release only the sums set opposite their respective names in the schedule thereto annexed; and the declaration averred, that the money so released was due upon other and different contracts than those mentioned in the declaration: Semble, that the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea: Held, also, that the plea was a good answer to the action.—*Wilkinson* v. *Lindo*, 7 M. & W. 81.

5. (*Several pleas.*) A plea of the general issue "by statute" cannot be pleaded together with a special plea raising the same grounds of defence.—*Legge* v. *Boyd*, 9 D.P. C. 39.

6. (*Same.*) Pleas, the one alleging the consideration of the debt to be money lent for the purposes of gaming, the other to be money lost at play, may be pleaded together, without imposing the condition that different matters of defence shall be given in evidence under them.—*Temple* v. *Keily*, 9 D. P. C. 62.

7. (*Frivolous demurrer, setting aside.*) A rule to set aside a demurrer to a replication as frivolous, must be drawn up on reading the plea as well as the subsequent pleadings.—*Hamer* v. *Anderton*, 9 D. P. C. 119.

8. (*Plea delivered in vacation.*)—A plea dated and delivered on the 23d October is a mere nullity, and it seems that the plaintiff may sign judgment for want of a plea; but if he applies to the court to set it aside, he must come within four days from the expiration of the time to plead.—*Mills* v. *Brown*, 9 D. P. C. 151.

And see Attorney, 4; Distress, 2; Power; Prescription Act; Slander; Tender.

POOR RATE.

1. (*Rateability of corporation lands.*) A corporation is not rateable to the relief of the poor in respect of lands, of which the profits are payable to the borough fund, under 5 & 6 Will. 4, c. 76, s. 92, although the land is situate in a parish without the limits of the borough. (7 B. & C. 61, 70, n.; 6 Ad. & E. 419; 1 P. & D. 334.)—*Reg.* v. *Inhabitants of Exminster*, 4 P. & D. 69.

2. (*Principle of rating tithes.*) The occupiers of lands were rated to the relief of the poor on an estimate of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and deducting from such rent the probable annual costs of the repairs, insurance, and other expenses necessary to maintain them in a state to command such rent, according to the 6 & 7 Will. 4, c. 96.

The vicar, who received 600*l.* a year, as a composition for small tithes, out of which he paid 82*l.* 15*s.* for tenant's rates and ecclesiastical dues, was rated on 540*l.*, as being the sum which the said tithes might reasonably be expected to let for from year to year, free of all tenant's rates and taxes, and deducting from such rent the amount of the ecclesiastical dues.

The occupiers, from the capital, time, and skill employed in the cultivation of their lands, made a profit which on an average amounted to two-thirds of the rent estimated above: Held, that the rate could not be invalidated on the ground of inequality, because the rent so estimated, on which the occupiers were rated, bore a smaller proportion to the profits of the land, than the sum at which the vicar was rated bore to the yearly value of his tithes. (2 P. & D. 219; 1 B. & Adol. 406.)—*Reg.* v. *Capel*, 4 P. & D. 87.

3. (*Rateability of school trustees.*) The Society of Friends conveyed certain premises to trustees as a school for the education of poor children. A committee met at the school once a quarter for the management of its affairs, and appointed a sub-committee, who met there once a month, and in the intervals the management was confided to a superintendent, who resided on the premises and received a salary. No child was eligible whose parents could defray the charge of its education elsewhere. The average expense of maintaining and educating each child was 20*l.* a year, towards which the child's friends, if able, were required to pay 12*l.* a year. The children, servants, matron, and superintendent were the only persons who resided on the premises.

Held, that the trustees were occupiers, and that the payment of 12*l.*, although it produced no gain on the balance, was a profit, which made them beneficial occupiers, and therefore chargeable to the poor rate in respect of the premises. (3 B. & Adol. 673; 6 Ad. & E. 419.)—*Reg.* v. *Sterry*, 4 P. & D. 122.

4. (*Rateability of officer of charitable society to poor and church rate.*) The treasurer of the London Missionary Society was rated to the relief of the poor, in respect of a house taken by the society, under a lease, for religious and charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, neither did he nor any other person connected with the society derive any profit from the occupation of the premises: Held, that he was not rateable to the relief of the poor.

But held, that he was properly assessed to a church rate, under an act extinguishing tithes in the parish, and authorizing a yearly church rate to be made, in order to raise money for the payment of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because *beneficial* occupation was not material in the latter case.—*Reg.* v. *Wilson*, 4 P. & D. 130.

POWER.

(*To demise lands, when well executed—Pleading.*) A power to demise lands, or any part of them, is not well executed by a demise of part, with liberty of shooting over the whole.

Where it is necessary to a plea of justification, under a lease from tenant for life, that he should be still living, the defendant must aver the continuance of the life, the plea is bad on general demurrer.—*Dayrell* v. *Hoare*, 4 P. & D. 114.

POWER OF APPOINTMENT.

(*Operation of rule in Shelley's case.*) Admitted, that an appointment in favour of children, with remainder to grandchildren, under a power, is void for the excess only.

Under the same instrument, an estate for life was given to D. T., remainder to K. T. for life, remainder to D. T. and the heirs of his body.—*Quære*, whether the rule in Shelley's case applies to such a case, the remainder not being to the heirs of the body of the tenant for life, but to him and such heirs.

Held, that at all events D. T. has no power to bar the intermediate estate for life to K. T.—*Doe* d. *Nicholson* v. *Welford*, 4 P. & D. 76.

PRACTICE.

1. (*Entering judgment nunc pro tunc.*) The power of the Court to enter up judg-

ment nunc pro tunc does not depend in any way upon 17 Car. 2, c. 8, but exists at common law, and may be exercised although the death of a party take place before the term ensuing the verdict, and although also more than two terms intervene between verdict and judgment, if the delay be not that of the party seeking to enter up judgment.

The defendant, who had obtained a verdict at the spring assizes, died before the first day of Easter term. In that term the plaintiff moved for a new trial, and the rule was refused on the last day of the term. The trial of the cause had lasted four days, and the costs were so heavy that the taxation was not complete, nor was judgment signed, until after Trinity term. In Michaelmas term following notice was given of the allowance of a writ of error, on the ground that judgment had not been signed within two terms after verdict. In Hilary term application was made for judgment nunc pro tunc, and was granted, the Court considering the defendant's representatives free from laches. —*Evans* v. *Rees*, 4 P. & D. 36.

2. (*Inspection of documents.*) The Court will not compel a party to permit his opponent in the cause to inspect and take a copy of a deed of conveyance, with a view only to the discussion of a rule for a new trial.—*Wood* v. *Morewood*, 9 D. P. C. 44.

3. (*Service of notices.*) The Court will not grant a *prospective* rule for the service of future notices in a cause, by sticking them up in the master's office.—*Davies* v. *Jenner*, 9 D. P. C. 45.

4. (*Service of rule.*) Service of a rule to compute on the shopman of the person in whose house the defendant resides, is insufficient.—*James* v. *Westdale*, 9 D. P. C. 104.

But service on a female sworn to be part of the defendant's family, or on a female sworn to be in the habit of receiving messages for the defendant at his dwelling house is sufficient.—*Weldon* v. *Dipman*, 9 D. P. C. 111; *Edwards* v. *Napier*, ib. 177.

5. (*Notice of declaration—Setting aside declaration.*) If the notice of declaration varies, in the description of the form of action, from the writ, the defendant may move to set aside the *declaration*, not the *notice* merely.—*Robinson* v. *Everington*, 9 D. P. C. 107.

6. (*Entry of verdict on postea.*) Where a party complains of an erroneous entry of the verdict by the associate, the proper course is to apply to the judge who tried the cause, to correct the entry by his notes. Where such application has been made, and the judge has refused to make any order, the Court will not entertain a motion to review his decision.—*Newton* v. *Harland*, 9 D. P. C. 65.

7. (*Postponing trial on alleged death of plaintiff.*) Intelligence having been received of the death of the plaintiff abroad, the Court, on the defendant's application, granted a rule for postponing the trial until the Court or a judge should direct it to be had; the plaintiff's attorney admitting that it was doubtful whether his client was still alive or not.—*Chesser* v. *Ridgway*, 9 D. P. C. 67.

8. (*Making judge's order rule of Court—Affidavit of service of order.*) An affidavit of service pursuant to Reg. Gen. T. T. 3 Vict. on the "attorney or agent" for the party, is sufficient.—*Morris* v. *Bedward*, 9 D. P. C. 130.

9. (*Judgment as in case of nonsuit.*) Where a plaintiff seeks to discharge a rule for judgment as in case of a nonsuit, on the ground of the defendant's insol-

vency, offering a stet processus, he ought clearly to show that he was not aware of the insolvency before the action was commenced.—*Smith* v. *Davis*, 9 D. P. C. 50.

And he must state that the insolvency was his reason for not proceeding to trial.—*Wainwright* v. *Gibson*, ib. 100.

10. (*Same.*) A rule for judgment as in case of a nonsuit cannot be drawn up with a stay of proceedings.—*Archer* v. *Smith*, 9 D. P. C. 99.

11. (*Same.*) If the defendant has paid money into Court pursuant to 7 & 8 Geo. 4, c. 71, the Court will not supersede an application to take that money out of Court on a motion for judgment as in case of a nonsuit, but a separate motion must be made for that purpose after the other has been disposed of.—*Vale* v. *Ganter*, 9 D. P. C. 106.

12. (*Same.*) It is a sufficient answer to a rule for judgment as in case of a nonsuit, that after issue joined, and before the rule was obtained, the debt and costs were paid by the defendant, though without his attorney's knowledge.—*Elias* v. *Elias*, 9 D. P. C. 104.

13. (*Service of rule.*) Where a defendant had deposited money in lieu of bail, and afterwards left the country, the Court allowed a rule nisi for taking the money out of Court to be served by sticking it up in the office.—*Know* v. *Duncan*, 9 D. P. C. 179.

14. (*Special jury.*) Where a defendant obtains a rule for a special jury for delay, the Court will not prevent him from having it tried by a special jury, but will compel him to try it in its order according to the notice of trial, although on a day when it is not the usual course to take special juries.—*Bush* v. *Pring*, 9 D. P. C. 180.

15. (*Setting aside nonsuit.*) Where a plaintiff elects to be nonsuited he cannot afterwards move to set that nonsuit aside.—*Barnes* v. *Whiteman*, 9 D. P. C. 181.

16. (*Right to begin.*) Assumpsit against acceptor of a bill of exchange, indorsed by the drawer to the plaintiff. The defendant pleaded that the bill was drawn and accepted for his accommodation, and handed to the drawer to get it discounted; that the drawer indorsed it in blank, and delivered it to A. to get it discounted, and that A., against good faith, delivered it to the plaintiff for a purpose unknown to the defendant, of all which premises the plaintiff had notice. On these pleadings, it was held that the defendant must begin.—*Lees* v. *Hoffstadt*, 9 C. & P. 599.

17. (*Same.*) In assumpsit on a plea of the defendant's discharge under the Insolvent Debtors' Act, which is denied by the replication, the defendant must begin.—*Lambert* v. *Hale*, 9 C. & P. 506.

18. (*Similiter.*) The common similiter, whether added by the party himself or his adversary, is not a pleading within Reg. Gen. H. T. 4 Will. 4, r. 1.—*Edden* v. *Ward*, 4 P. & D. 155.

PRESCRIPTION ACT.

1. (*Plea of right of way, when it must be specially replied to.*) To an action of trespass qu. cl. fr., the defendant pleaded a right of way across the locus in quo for the occupiers of B. field, on foot, and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71. The replication

traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of parliament (the Trent Navigation Act, 23 Geo. 3, c. 48) under which the Trent Navigation Company, before the commencement of the twenty years, made a haling path for towing vessels along the river, across the locus in quo, into B. field; that after the commencement of the twenty years, under the powers of another act of parliament, the Dunham Bridge Act, 11 Geo. 4, c. lxvi.), another haling path was set out nearer to the river, but also across the locus in quo and into B. field, and that thereupon the Navigation Company abandoned the former hailing path, which thenceforth ceased to be used as such; that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed as of right and without interruption, by virtue and under the provisions of the first act of parliament, a way along the first mentioned haling path, across the locus in quo, on foot and with cattle, which right of way ceased and determined on the abandonment of that haling path: but that from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way as a continuation of the right before enjoyed by them under the act of parliament, continued to use the same way; which way, and the use and enjoyment thereof along the haling path as aforesaid, is the same way, and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages: Held, on demurrer, that the replication was good: that it disclosed facts showing that the defendants' user, although as of right and without interruption during the twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2 and 5, was not such as would, before the statute, have been sufficient to prove a claim by prescription or non-existing grant: and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea. —*Kinloch* v. *Nevile*, 6 M. & W. 795.

2. (*Profit à prendre—Reservation of liberty of sporting.*) By a deed A. and B. conveyed to D. and his heirs certain lands, excepting and reserving to A., B. and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl: Held, that this was not in law a reservation, properly so called, but a new grant by D. (who executed the deed) of the liberty therein mentioned: and therefore that it might enure in favour of C. and his heirs, although he was not a party to the deed. (2 Ad. & El. 705.)

The grant to a person, his heirs and assigns, of "free liberty with servants or otherwise to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of licence of profit, and not of a mere personal licence of pleasure, and therefore it authorises the grantee, his heirs and assigns, to hawk, hunt, &c., and by his servants in his absence. Such a liberty is, therefore, a profit à prendre, within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. (3 Mod. 246; Manw. 108.)—*Wickham* v. *Hawker*, 7 M. & W. 63.

PRISONER.

(*Discharge under* 48 *Geo.* 3, *c.* 123.) Service on one of two plaintiffs, who undertakes to accept it on behalf of both, is sufficient to entitle a defendant to his discharge, under 48 Geo. 3, c. 123.—*Faulkner* v. *Haslar*, 9 D. P. C. 139.

PROBATE DUTY. See LEGACY DUTY.

PROCESS.

1. (*Distringas.*) The affidavit in support of an application for a distringas stated

the requisite number of calls, &c., but set forth that at the second call, the deponent was informed that the defendant had been away from home for five weeks, and also that, upon inquiry in the neighbourhood, he had learned the same fact, and that the defendant was believed to be out of the way to avoid service of a writ of execution in another action. The Court granted the writ. —*Archer* v. *Brindley*, 9 D. P. C. 38.

2. (*Same.*) Where a defendant moves to discharge a rule obtained for a distringas to compel appearance, he should bring before the Court the affidavits on which that rule was granted.—*Cooper* v. *Folkes*, 9 D. P. C. 46.

3. (*Same.*) An affidavit in support of a motion for a distringas stated that the defendant could not be found, and that his residence was unknown; but that communications had been had with his partner (who was a co-defendant in the action) at their counting-house, when the latter said the defendant was in England; but the affidavit containing no statement of an inquiry having been made where the defendant was, the Court refused the writ.—*Greenwood* v. *Selden*, 9 D. P. C. 72.

4. (*Same.*) An affidavit in support of an application for a distringas, need not state in terms the deponent's belief that the defendant is keeping out of the way to avoid service, if the facts disclosed in it lead to the inference that he is so doing.—*Channing* v. *Cross*, 9 D. P. C. 118.

5. (*Distringas—Entering appearance for defendant.*) Where a defendant, by fastening up his house, prevents the sheriff from executing a distringas, the Court will allow the plaintiff to enter an appearance for him, although the defendant is known to be in the house.—*Whishaw* v. *Brown*, 9 D. P. C. 123.

6. (*Setting aside distringas.*) Where a *copy* of a distringas, in the teste of which the date was omitted, was served on the 28th August, it was held to be too late on the 10th November to take advantage of the omission. It is only an irregularity, and does not render the writ a nullity.—*Quilters* v. *Neeley*, 9 D. P. C. 139.

7. (*Setting aside service of summons.*) A motion to set aside the *copy* of a writ of summons for irregularity, is informal. (5 M. & W. 605; 1 Scott, N. R. 417.) *Kenny* v. *Bishop*, 9 D. P. C. 57.

8. (*Service of writ of summons.*) Where the defendant's place of abode could not be found, but letters left for him at a relative's house were answered by him, the Court would not allow service of the writ of summons at the relative's to be deemed good service.—*Sainsbury* v. *Thorp*, 9 D. P. C. 163.

RAPE.

1. (*Recent statement of prosecutrix.*) The parties of the recent complaint of the prosecutrix cannot be received, where she has died since the injury, as independent evidence to show who were the parties who committed the offence: statements of this kind are only admissible in support of the credibility of the prosecutrix as a witness on the trial. (2 Stark. N. P. C. 242; 2 M. & Rob. 212.)—*Reg.* v. *Messon*, 9 C. & P. 420; see also *Reg.* v. *Guttridge*, ib. 471.

2. (*Indictment.*) An indictment for rape charged that the prisoner in and upon E. F. feloniously and violently did make (omitting the words "an assault,") and her the said E. F. then and there, against her will, feloniously and violently did ravish and carnally know, &c.: Held good, in arrest of judgment.—*Reg.* v. *Allen*, 9 C. & P. 521.

REPLEVIN.

Where a defendant in replevin obtains judgment of non pros for a return, and a certain amount for costs, the judgment is not final until taxation: but it would be final if it were for a return only. In such a case, the defendant, in order to obtain his costs, should assess them before a jury, as consequential on his damages. (1 Saund. 195.)

A writ of pone per vadios, made returnable in vacation instead of in term, although by mistake, is irregular, and will be set aside.—*Wright* v. *Lewis*, 9 D. P. C. 183.

And see LANDLORD AND TENANT.

RESERVATION. See PRESCRIPTION ACT, 2.

RIOT.

(*Riotous demolition of house.*) Destroying moveable shop shutters is not a beginning to demolish within the stat. 7 & 8 Geo. 4, c. 30, s. 8, as they are not part of the freehold.

A destruction by fire is within the statute.—*Reg.* v. *Howell*, 9 C. & P. 437.

SESSIONS.

(*Mandamus to, to grant special case.*) The Court will not issue a mandamus to a Court of Quarter Sessions, commanding them to *grant* a case, although under special circumstances it may issue a mandamus commanding them to *state* a case. (2 B. & Adol. 391.)—*Exp. Inhabitants of Jarvin*, 9 D. P. C. 120.

SEWERS.

A parish, consisting of two districts, had immemorially been assessed to the repairs of a sea bank (which was necessary for the protection of lands from the sea in both districts), by one assessment, collected by one dyke-reeve. The commissioners of sewers, *without any presentment* of a jury, appointed two dyke-reeves, one for each district, and made a rate on one district exclusively for the repairs of the sea-bank: Held, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable in trespass for the taking of the plaintiff's cattle under a distress warrant issued by them for arrears of such rate.—*Wingate* v. *Waite*, 6 M. & W. 739.

SHERIFF.

(*Action against, for false return, when waived.*) Where, after a return to a fi. fa. that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. (Overruling Beynon v. Garrat, 1 C. & P. 154.)—*Holmes* v. *Clifton*, 10 Ad. & E. 673; 4 P. & D. 112.

SHOOTING.

If a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms, within the stat. 1 Vict. c. 85, ss. 3, 4.

If a person present a pistol, purporting to be loaded, at another, so near as to have been dangerous to life if the pistol, being loaded, had gone off, this is an assault in law, though the pistol were not in fact loaded.

On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault distinct from the felony charged, but only of

an assault involved in the felony itself.—*Reg.* v. *St. George*, 9 C. & P. 483; see also *Reg.* v. *Lewis*, ib. 523.

SIGNIFICAVIT. See ECCLESIASTICAL COURT.

SLANDER.

(*Pleadings—Imputation of robbery—Colloquium.*) A declaration for the following words, alleged to have been spoken by the defendant's wife, of the plaintiff:—"You robbed me, for I found the thing you have done it with:" Held, that the words were actionable per se, without any colloquium or innuendo to explain the sense in which they were used. (4 B. & Adol. 630; 1 Ad. & E. 554.)—*Rowcliffe* v. *Edmonds*, 7 M. & W. 12.

STAMP.

(*What amounts to a lease.*) A., the owner of a farm, let it for seven years to B., and by a written agreement of the same date it was agreed that A. should manage the farm for B., B. allowing him 12*s.* a week, and allowing him and his family to reside in and have the use of the dwelling house and furniture free of rent; which agreement was to be put an end to by three months' notice or three months' wages: Held, that this agreement did not require a lease stamp, for that it did not contain any demise of the house, the occupation of it being a mere remuneration for services: Held, also, that no notice to quit was necessary, if the service was put an end to.—*Doe* d. *Hughes* v. *Derry*, 9 C. & P. 494.

STOCKJOBBING ACT.

Indebitatus assumpsit for stock sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. Plea, that the stock alleged to be caused to be transferred was so caused to be transferred, by virtue of an agreement with the plaintiff for the transfer of the same in consideration of 453*l.* 5*s.* to be therefore paid to the plaintiff for the same; and that at the time of the making of such agreement, the plaintiff was not actually possessed of or entitled to the stock in his own right, &c. by means whereof the said contract became and was null and void: Held, that the plea was no answer to the action, and that the contract was not within the 7 Geo. 2, c. 8, s. 8.—*Mortimer* v. *M'Callan*, 7 M. & W. 20.

TENDER.

(*Pleading—Replication of prior demand.*) Assumpsit by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.*, payable on demand; averring a demand on a particular day. Plea, as to 3*l.*, parcel, a set-off due at the time when the note was demanded, and ever since; concluding with a verification and prayer of judgment: and as to 12*l.* 9*s.* 4*d.*, residue, that at the time of the demand the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and hath always, from the time of making his said promise, as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that, before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.*, was due upon the note; and that before the said tender, the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.*, which so in-

cluded the 12*l.* 9*s.* 4*d.*, but the defendant refused to pay the 15*l.* 9*s.* 4*d.*; and that at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed: Held, on special demurrer, that the replication was good.—*Cotton* v. *Godwin*, 7 M. & W. 147.

THAMES AND ISIS NAVIGATION ACT.

(*Costs under.*) The quarter sessions have no power to give costs against an appellant, under the Thames and Isis Navigation Act, 15 Geo. 3, c. 11, s. 4.

Semble, that provision does not apply to the respondents.—*Reg.* v. *Justices of Oxfordshire*, 9 D. P. C. 189.

TITHES. See POOR RATE, 2.

TRESPASS.

(*For continuing injury.*) Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation: and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection.

Therefore, where trustees of a turnpike road built buttresses to support it on the land of A., who thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction for such trespass: Held, that, after notice to the trustees to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on his land, and that to such action the former recovery was no bar. (1 Stark. 22; 1 Saund. 24; 2 Ld. Raym. 976; 5 M. & W. 337.)—*Holmes* v. *Wilson*, 10 Ad. & E. 503.

TROVER. See PLEADING, 1.

VENDOR AND PURCHASER.

1. In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of an agreement between the defendant and the plaintiff, whereby the defendant, in consideration of 2115*l.*, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff &c., with a good title; and the plaintiff agreed, that, on the said 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that in case the purchase should not be completed on the said 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from the making of the agreement *until and upon the said 25th day of March*, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice &c., yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title, &c.; alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's: Held, that upon this declaration the plaintiff could not recover for any expenses or loss of interest subsequent to 25th March.—*Metcalfe* v. *Fowler*, 6 M. & W. 830.

2. (*Whose duty to tender conveyance.*) A declaration in covenant by the vendor against the intended purchaser of lands, for non-payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been *ready and willing* to execute a conveyance: inasmuch

as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution. (Forrest, 61 ; 6 M. & W. 6.)—*Poole* v. *Hill*, 6 M. & W. 835.

VESTRY. See CHURCHWARDENS; OVERSEERS.

WARRANT OF ATTORNEY.

1. (*Judgment on old warrant of attorney.*) On moving to sign judgment on a warrant of attorney, it is not a sufficient excuse for not producing an affidavit of the attesting witness, that an application to a person acquainted with the witness's address has been unsuccessful in obtaining it, although the handwriting of the defendant and of the witness to the warrant of attorney is verified.—*Cope* v. *Lea*, 9 D. P. C. 102.

2. (*Same.*) Since the rule of H. T. 2 W. 4, s. 73, a rule absolute in the first instance, for judgment on a warrant of attorney more than ten years old, cannot be granted, although the defendant, shortly before the application, has acknowledged the debt to be due.—*Nicholas* v. *Merit*, 9 D. P. C. 101.

WARRANT OF COMMITMENT.

(*Protection of constable under—Order of filiation.*) The defendant, a constable, justified the assault and imprisonment of the plaintiff under a magistrate's warrant of commitment. It was objected to this warrant that it erroneously recited that the plaintiff was then present to hear the complaint against him, although he was in another county, and that on the indorsement of it for execution by a magistrate of the county where the plaintiff was, it did not appear that the handwriting of the committing magistrate had been proved according to 24 G. 2, c. 55, s. 1. Held, that, if these objections to the warrant were tenable, they showed "defect of jurisdiction" in the magistrates, and did not deprive the constable of the protection given him by the warrant under 24 G. 2, c. 44, s. 6.

The defendant, a constable, who had taken the plaintiff to gaol, under a magistrate's warrant, was called upon, under 24 G. 2, c. 44, s. 6, for a copy of the warrant and perusal of the original. The defendant gave the plaintiff a copy, but was unable to grant a perusal of the original, because it was retained by the gaoler for his own protection. The plaintiff, on information of this circumstance, made no objection to its non-production. Held, that he had dispensed with the production of the original.

A constable, who is conveying a party to prison under a magistrate's warrant, under 49 G. 3, c. 68, for non-payment of a certain sum, under an order of filiation and maintenance, is not bound to discharge his prisoner on tender of that sum.—*Atkins* v. *Kilby*, 4 P. & D. 145.

WITNESS.

1. (*Competency—Indorsement on record under* 3 & 4 *W.* 4, *c.* 42, *s.* 26.) Trespass for distraining the plaintiff's goods. Plea, that W. held the premises as tenant to the defendants at a rent of 10*l.*; and distress for such rent. Replication, non tenuit. The case opened for the plaintiff at the trial was, that W. was seised in fee, and that the plaintiff held the premises of him at a rent of 3*l.* Held, that the wife of W. was not a competent witness for the plaintiff to prove those facts, because, in the event of a verdict for the defendants, W. would be liable over to the plaintiff: and that the incompetency, being independent of any use that might be made of the verdict, was not removed by the indorse-

ment of the witness's name on the record, under 3 & 4 W. 4, c. 42, s. 26.—*Wedgewood* v. *Hartley*, 10 Ad. & E. 619; 4 P. & D. 84.

2. (*Tender of expenses to—Attachment.*) A witness, on being served with a subpœna, received 1*s.* only as conduct money, but went to the assize town without having made any further demand. On the morning of the trial, she refused to proceed to the Court unless she received 9*l.* Held, that the plaintiff, not having made any tender to her of a reasonable sum for her expenses in returning home, was not entitled to an attachment against her for disobedience to the subpœna.—*Newton* v. *Harland*, 9 D. P. C. 16.

3. (*Competency of, time for inquiring into.*) Where a witness has been called, and after he has been dismissed by the party who called him, it is discovered, from private information, that the witness is interested, and the party recalls him merely to inquire as to the existence of his interest, it is too late then to exclude him as incompetent.—*Tellingham* v. *Sparrow*, 9 D. P. C. 141.

4. (*Attachment against—Form of subpœna.*) Where a writ of subpœna duces tecum required the defendant's attorney to appear at a particular day, but did not command him to appear from day to day till the trial of the cause; and the cause being postponed at the instance of the defendant, the attorney failed to appear on the day when it was called on; the Court refused an attachment for disobedience to the subpœna.—*Vaughton* v. *Brine*, 9 D. P. C. 179.

5. (*Compelling attendance of.*) A magistrate has no right to issue a warrant for the apprehension of a person to attend to *find bail* for his appearance as a witness at the assizes, although it is sworn that the witness is material and has refused to obey a summons, which had previously issued, to give evidence before the magistrate.

Quære, whether a magistrate can, after a summons to give evidence before him has been disobeyed, issue a warrant to compel the witness's attendance. (1 Burn's Just. 1073.)—*Evans* v. *Rees*, 4 P. & D. 32.

WRIT OF ERROR. See BAIL, 1.

WRIT OF TRIAL.

1. (*Suggestion under Middlesex County Court Act.*) An application to enter a suggestion for costs under the Middlesex County Count Act may be made as well in a case tried before the sheriff under a writ of trial, as in case before a judge at nisi prius. (6 Bing. N. C. 12; 5 D. P. C. 170, 509.)—*Forbes* v. *Summons*, 9 D. P. C. 37.

2. (*New trial.*) The fact of the person acting as the sheriff's deputy, in trying the cause, being the attorney for the defendant, is not a ground for a new trial. —*Briggs* v. *Sowton*, 9 D. P. C. 105.

3. (*New trial, motion for, when to be made.*) An application for a new trial in a cause tried under a writ of trial in vacation, must be made within the first four days of the following term: and if the sheriff's notes cannot be procured, application must be made within the first four days for further time for that purpose. (2 D. P. C. 664.)—*Williams* v. *Andrews*, 9 D. P. C. 123.

EQUITY.

[Containing cases in 4 Mylne & Craig, Part 2; 2 Beavan, Part 2, and 10 Simons, Part 1.]

ADMINISTRATION OF ASSETS.

1. (*Administration of assets.*) Executors made some payments on account of a legacy, and nine years after the death of testator passed their accounts at the legacy duty office, showing a considerable residue, upon which they paid the duty: Held, that the legatee was entitled to immediate payment without taking the accounts.—*Whittle* v. *Henning*, B. 396.

2. (*Carrying on trade.*) Where an order is made in an administration suit that executors may carry on the business of the testator, parties supplying on credit what is necessary for that purpose are entitled to be paid out of the funds in Court.—*Tinkler* v. *Hindmarsh*, B. 348.

3. (*Costs of persons not parties.*) Where there is an inquiry in the Master's office as to the rights of persons not parties, and they succeed in establishing their title, they are entitled to the costs of the inquiry in the same way as if they had been parties originally, and may obtain such costs on the suit coming on for further directions. *Shuttleworth* v. *Howarth*, M. & C. 492.

4. (*Judgment during a suit—Laches.*) In 1811 a creditor's suit was instituted by a simple contract creditor; the answers were got in in 1820, admitting the plaintiff's debt, whereupon the assets were brought into Court, but no decree was made till 1829: Held, that a judgment obtained in 1823 was entitled to priority over the simple contract debts. *Larkins* v. *Paxton*, B. 219.

5. (*Same point.*) Upon the principles laid down in the above digested case, next of kin not originally parties were held entitled to their costs.—*Hutchinson* v. *Freeman*, M. & C. 490.

And see APPEALS ON REPORTED CASES, 4.

APPEAL.

1. (*As to costs alone.*) Although generally an appeal will not be entertained upon a question of costs alone, yet it may be so under special circumstances, as where costs are prayed for as part of the relief, or where the costs are not merely personal, but, by the order appealed from, are charged upon a particular fund or estate. Both these circumstances concurred in this case, and the appeal was allowed, being as to the costs alone, and the order varied.—*Angell* v. *Davis*, M. & C. 360.

2. (*Costs—Usual undertaking.*) The common undertaking upon an appeal to pay such costs (if any) as the Court shall think fit to award in respect of any proceedings had since the decree, applies only to costs incurred in carrying out the decree appealed from.—*Price* v. *Dewhurst*, M. & C. 282.

APPORTIONMENT OF RENT.

(4 & 5 *W.* 4, *c.* 22.) Rent not reserved in writing, as rent upon a verbal demise from year to year, is not apportionable under the above statute.—*Re Markby*, M. & C. 484.

BEDFORD LEVEL.

(*Registration.*) By the Bedford Level Act (15 Car. 2, c. 17) it was enacted, that all conveyances by indenture of any part of the 95,000 acres allotted to the Earl of Bedford and his co-adventurers, entered with the registrar of the Level, should have equal force to convey the freehold and inheritance as a bargain and sale enrolled under the stat. H. 8; and it was also provided, "that no lease, grant or conveyance of any part of the said land, except leases for seven years or under in possession, *should be of force but from the time it should be entered with the registrar:*" Held, in a suit for specific performance, that the condition of registration was required only for the purpose of entitling the party to the corporate privileges conferred by the act, and that the absence of registration did not vitiate the title to the land. (Hodson v. Sharpe, 10 East, 350 (commented on) *Willis* v. *Brown*, S. 127.

BREACH OF TRUST.

(*Liability of third party.*) The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular terms of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee, but only for such payments as he had made against the trust and without such direction.—*Roberts* v. *Loyd*, B. 376.

CHARGE.

(*Power of sale—Personal liability.*) Testator gave lands to A., upon trust to pay to his (testator's) widow an annuity of 28*l.*, and after her death to A. and his heirs, with power to the widow to sell, if the annuity was in arrear. At the time of testator's death A. was and afterwards continued in possession of the land. The rent was insufficient to pay the annuity. Held, that A. was not personally liable for the arrears, but that the widow might compel a sale.—*Button* v. *Button*, B. 256.

And see APPEALS ON REPORTED CASES, 2.

CHARITY.

1. (*Cy-pres.*) Where there is only a partial failure of the objects of a charity, the Court, in applying the principle of *cy-pres* to that part of the fund which has been so released, will take into consideration the intention of the testator as shown in the other charitable trusts. Accordingly where the purpose that failed was the redemption of British slaves in Barbary, and one of the other objects was the endowment of schools in London and its suburbs, the Master of the Rolls having referred it back to the Master to select a scheme *cy-pres* with reference to the other objects of the will, the Lord Chancellor on appeal, affirming the principle above stated, directed the released fund to be applied in support of charity schools in England generally.—*Attorney General* v. *The Ironmongers' Company*, B. 313.

2. (*Jurisdiction on petition.*) Where two parties claim adversely the right of administering the funds of a charity, the Courts will not decide the question on petition under the 52 G. 3, c. 101. (See Re Dean Clarke's Charity, 8 Sim. 34; L. M. No. 39.)—*Re West Rediford Church Lands*, S. 101.

3. (*Same point.*) The Court held it was not authorized, under 52 G. 3, c. 101, to make an order on petition for transferring the funds of a dispensary to a hospital and amalgamating the two institutions, although there was no opposition before the Court to the order sought, the parties who would have opposed not having been properly served, and therefore not being entitled to appear.—*Re Reading Dispensary*, S. 117.

4. (*Power of trustees.*) Held, that the trustees of land given "to the use of a school" had no power to exact from the schoolmaster a bond that he should not claim a freehold in the school or estates, but should quit at six months' notice, with other stipulations.—*In re the Royston Free Grammar School*, B. 228.

COMPOSITION DEED.

(*Secret advantage.*) A creditor who joins other creditors in accepting a composition cannot reserve to himself a particular advantage, as the right of realizing a security, without communicating his intention to the others; and it is not sufficient that there is no endeavour to mislead them on his part, but he is bound to see that they are not misled.—*Cullingworth* v. *Loyd*, B. 385.

CONSTRUCTION.

(*Agreement.*) A husband went abroad leaving his wife and child unprovided for, whereupon the father of the husband and the father of the wife entered into an agreement to allow the wife 30*l.* each so long as she should continue separate and apart from her husband: Held, that the allowance was determined by the death of the husband.—*Miller* v. *Woodward*, B. 271.

And see APPEAL, 2; COVENANT.

CONSTRUCTION OF STATUTES.

1. (1 & 2 *Vict. c.* 110—*Jurisdiction.*) The Court has no jurisdiction under sect. 14 of this act to order monies standing in the name of the accountant general to stand charged with a judgment debt of the party entitled to such funds; but such an order may be made by one of the common law judges.—*Miles* v. *Presland*, B. 300. (Affirmed on appeal, M. & C. 431. And see Hulkes v. Day, *infra*, tit. JURISDICTION.)

2. (1 & 2 *Vict. c.* 110—3 & 4 *Vict. c.* 82.) An order under the above statutes, charging the stock standing in the name of the accountant general, affects only the interest of the debtor, and does not interfere with the rights of prior incumbrancers.—*Hulkes* v. *Day*, S. 41.

And see APPORTIONMENT OF RENT; BEDFORD LEVEL; FOREIGN CONTRACT; JOINT STOCK BANK; PARTIES.

COPYHOLD.

(*Common law and customary heirs.*) Held, that on a limitation of copyholds in tail, by way of trust executed, the customary heir took to the exclusion of the common law heir.—*Trash* v. *Wood*, M. & C. 324.

COSTS.

(*Several defences.*) Where several persons are made defendants in respect of a joint fiduciary character, although one of them has a beneficial interest, yet if it be not conflicting with his duty as trustee, they ought not to answer seve-

rally, and only one set of costs will be allowed to such defendants.—*Gaunt* v. *Taylor*, B. 346.

And see ADMINISTRATION OF ASSETS, 1, 5; APPEAL, 1, 2; ISSUE, 2; PRACTICE, 6; PRODUCTION OF DOCUMENTS; SHORT CAUSE.

COVENANT.

(*Assignment.*) A., the owner of land which it was intended to let for building, with ornamental grounds, enters into an agreement with B. for selling to him the lots 2, 3, 4, and 5; subject to a certain condition, as to the distance from the boundary of the land sold at which the houses should be built. He afterwards conveys to B. lots 2 and 3, the covenants in the conveyance being according to the terms of the agreement. Shortly after, B. surrenders up the agreement to A. as to lots 4 and 5, and these lots are afterwards sold to C., who builds upon them at a less distance from the boundary than was stipulated in the original agreement between A. and B. B. in the meanwhile had sold the house on lot 3 to D. Held, that the latter had no right against C. under the agreement originally entered into between A. and B. as to the mode of using the lots 2, 3, 4, and 5, when sold together.

The case was also rested in some measure upon a general deed entered into by A. for the laying out and management of the property, and particularly a clause binding him to exact from the purchaser of every lot a covenant so to use his lot as not to deteriorate the value of those contiguous, and to this deed a plan was annexed. This deed was not signed by B., the plaintiff; and it was held with reference to this part of the case, that the plan was not intended to be binding in all its details, and that the provision against deterioration of value was of too vague and uncertain a nature to afford itself a ground of suit.—*Schreiber* v. *Creed*, S. 9.

DEBT. See LUNATIC, 3.

EVIDENCE.

(*Interest—Co-plaintiff.*) A plaintiff in an administration suit was not allowed to examine in the Master's office his co-plaintiff in support of his own debt, by reason of the interest, in regard of liability to costs, which each co-plaintiff in such a case has in making out a title in one of them to maintain the suit.—*Edwards* v. *Goodwyn*, S. 123.

FOREIGN CONTRACT.

(*General principle—Bill of exchange.*) The general principle is, as to contracts merely personal, that their construction is governed by the law of the country where they were made, the consequences of their breach, by that of the country where they are enforced.

A bill of exchange drawn and accepted in France, but made payable in England, and with no stipulation as to interest, was held to carry English interest only.—*Cooper* v. *The Earl of Waldegrave*, B. 282.

FRAUD. See PLEADING, 4; VOLUNTARY DEED; APPEALS ON REPORTED CASES, 3.

HEIR. See PARTIES.

HUSBAND AND WIFE.

(*Agreement—Provision—Power.*) A wife having an estate for life for her separate use in lands, with an absolute power of appointment over the reversion, joined

her husband in an agreement to execute a mortgage: Held, that such agreement was binding on the wife surviving.—*Stead* v. *Nelson*, B. 245.

INFANT.

(*Conveyance.*) Where one of the parties is an infant, and the decree is to direct a conveyance, it ought to contain an *unconditional* order of reference to the Master, to settle such conveyance.—*Calvert* v. *Godfrey*, B. 276.

See PLEADING, 5.

INFORMATION.

(*Attorney-General.*) Every information is properly the suit of the Attorney-General, and he ought not to be heard as counsel for any other party but himself, as the institutor of the suit, though it has been the practice to allow the relators to appear by counsel of their own, and though the Attorney-General observed that he had been heard in opposition to the information in the House of Lords in the case of Lady Hewley's charity.—*The Attorney-General* v. *The Ironmongers' Company*, B. 313.

INJUNCTION. See ISSUE, 3; PRACTICE, 3, 4, 10.

INTEREST.

(*Implied contract.*) The defendant wrote to his receiver and professional agent, "If you will remit the 400*l.*, I can give you a note for it when you come to London;" the money was remitted, but no note given: Held, that a special contract must be implied, and interest was allowed.—*Rhoades* v. *Lord Selsey*, B. 359.

INTERPLEADER.

(*Agency.*) One of several part-owners who was acting as ship's husband employs a broker, who knew of the rights of the other owners, to effect an insurance upon the whole: a loss happening and the money being paid over to the broker, and actions brought by the first-mentioned part-owner and one of the others: Held, that the broker might maintain a suit of interpleader against them, it being a question to be considered whether he was agent only of the owner instructing him, or of the others also. (See Braik v. Douglas, reported in note.)—*Smart* v. *Welch*, M. & C. 305.

ISSUE.

1. (*Conclusiveness of verdict—Practice.*) Where an issue has been granted upon an interlocutory application, without binding the parties to abide by the result, it is open to the party against whom the issue has been found, although the Court has refused him a new trial, to proceed to evidence in the cause in opposition to the verdict, and if his evidence is sufficient to raise a reasonable doubt, the Court will at the hearing grant *another* trial of the issue. The Court however intimated that it would not for the future grant an issue upon interlocutory order, without requiring the party applying for it to be bound by the result, subject of course to his right to apply for a new trial.—*Ansdell* v. *Ansdell*, M. & C. 449.

2. (*Costs out of intestate's estate.*) Where the nominee of the crown was in possession of an intestate's estate, and certain parties, who had failed to prove themselves next of kin before the Master, obtained an issue to try that question, the Court would not, against the consent of the nominee of the crown, who

was defendant, grant an advance out of the estate for the purpose of trying the issue.—*Nye* v. *Maule*, M. & C. 342.

3. (*Rule nisi, at law, for new trial.*) Although a patentee had obtained a verdict, yet there being a rule *nisi*, at law, for a new trial, the Court refused to grant him an injunction.—*Collard* v. *Allison*, M. & C. 487.

JOINT STOCK BANK.

(*Public officers*, 1 & 2 *Vict. c.* 96.) The above statute (which has since been renewed from year to year), which enables members of joint stock banking companies to sue and be sued by the public officer in respect of demands between them and the company, does not apply to demands arising from the relation of partnership, but such demands only as may arise from the member's having banking accounts with or bills discounted by the company. *Sed quære.* In this case there was another objection to the suit, which was much relied on, namely, that it was to be relieved from the consequences of a fraud committed three years before by the false representations of the directors, since which time there had been much change in the composition of the company.—*Seddon* v. *Connell*, S. 58.

JURISDICTION.

1. (*Concurrent suits.*) A party who had obtained a decree in the Court of Chancery was restrained with costs from prosecuting the same claim in the Scotch Courts, in order to make liable lands of the defendant in Scotland, though it was stated by the Court that permission to prosecute such a suit might have been granted on inquiry, and leave was given to apply for such permission,—and the same principle was affirmed on appeal by the Lord Chancellor, who gave leave to the plaintiffs to proceed in Scotland so far as might be necessary to obtain security for what was due in the other suit.—*Wedderburn* v. *Wedderburn*, B. 208.

2. (1 & 2 *Vict. c.* 110; 3 & 4 *Vict. c.* 82, *stop order.*) Although Courts of Equity have not jurisdiction under the above statutes to make an order to charge the stock standing in the accountant general's name to the account of a party against whom a judgment debt has been recovered; (see Miles v. Presland, *supra*, CONSTRUCTION OF STATUTES;) yet they will, in the exercise of an ancillary jurisdiction, grant a stop order to prevent the stock being transferred before the proper charging order can be made by the common law judge.—*Hulkes* v. *Day*, S. 41.

And see CHARITY, 2, 3; SPECIFIC PERFORMANCE, 1.

LACHES.

(*During suit.*) A bill was filed in 1828 by the representatives of the cestui que trust against those of the trustee under a deed of which the trust expired in 1810; the answer was filed in 1829, but no further proceedings were taken till 1839: Held, that as to the lapse of time, the case stood as it did when the bill was filed, and that there were not such laches as to bar the claim.—*Dickinson* v. *Lord Holland*, B. 310.

And see ADMINISTRATION OF ASSETS, 3.

LUNATIC.

1. (*Administration of estate.*) The cost of ordinary repair on the freehold estate of a lunatic is borne by the personal estate, but if there is any extraordinary

outlay, as for building a house, it would be a charge for the next of kin.—*Re Badcock*, M. & C. 440.

2. (*Carriage of Commission.*) In a competition between the brother and wife of an alleged lunatic for the carriage of the commission, preference was given to the brother, because the wife had an interest in preventing the proof of the lunacy being carried back beyond a particular date.—*Re Whittaker*, M. & C. 441.

3. (*Debt.*) Where a stepfather of a lunatic (not so found by inquisition) had contributed to his maintenance and paid his funeral expenses: Held, that on neither of these accounts was a debt created, chargeable on the real estate of the lunatic under 3 & 4 Will. 4, c. 104.—*Carter* v. *Beard*, S. 7.

MARRIAGE SETTLEMENT.

(*Reformation.*) Where the proposals previous to marriage were that the father of the wife should make an allowance to her of 200*l.* a year during her life, and if she died leaving children, then to her children during life of wife's father, and if she died without issue, an allowance of 150*l.* to be made to the husband, and the settlement, by mistake, gave to the husband the 200*l.* absolutely during his life, the settlement was, upon his insolvency, corrected by reference to the proposal.—*Pearse* v. *Verbeke*, 333.

MARRIED WOMAN.

(*Contract by.*) A married woman joined her husband in a deed, which purported to convey by way of appointment the fee simple of certain lands to a mortgagee; the lands were really settled to the separate use of the wife for life, remainder to the husband for life, with remainder over, and without any power to the wife, and the deed of appointment had, it seemed, been executed from misapprehension; the mortgage money was decreed to be raised out of the life estate.—*Wainwright* v. *Hardisty*, B. 363.

MISTAKE. See MARRIAGE SETTLEMENT.

MORTGAGE.

(*Form of decree.*) As to decree in case of complicated securites, see *Aldworth* v. *Robinson*, B. 287.

NOTICE. See BREACH OF TRUST; APPEALS ON REPORTED CASES, 4.

PARTIES.

(*Heir—3 & 4 Will. 4, c. 104.*) The heir as well as the devisee is a necessary party to a creditor's suit for administering real assets under the above statute.

The decision in Wicks v. Evans, reported 7 Sim. p. 546, L. M. No. 38, is wrong as to this point.—*Brown* v. *Weatherby*, S. 125.

See HEIR; CONSTRUCTION OF STATUTE.

PATENT.

(*Long possession—Issue.*) Although the patent was of long standing, yet the evidence of exclusive possession being doubtful, the Court granted an issue. (Hill v. Thompson, 3 Mer. 622.)—*Collard* v. *Allison*, M. & C. 487.

And see APPEALS ON REPORTED CASES, 1.

PLEADING.

1. (*Contingent relief.*) A bill praying relief against some of the defendants, only contingently, upon relief not being given against the others, is demurrable.—*Seddon* v. *Connell*, S. 79.

2. (*Demurrer—Prayer.*) On a demurrer for want of parties, the question is not whether the plaintiff might not have some relief against the defendants, without adding other parties, but whether he can have the relief prayed for.—*Lidbetter* v. *Long*, M. & C. 286.

3. (*Effect of reference.*) A defendant by his answers set out part of pleadings at law, referring "for greater certainty as to the said declarations and pleas to a copy thereof when produced:" Held, that the plaintiff was entitled to read the whole.—*Rawson* v. *Samuel*, M. & C. 330.

4. (*Fraud—Parties.*) Where the bill seeks to be relieved from the consequences of a *fraud*, committed by several persons, it is not necessary to make all of them defendants, because in such a case there is no right to contribution between them.—*Seddon* v. *Connell*, M. & C. 79.

5. (*Inconsistent claims—Frame of suit.*) A person, though uniting in himself several characters, in one of which only his claim can be good, may maintain a suit as sole plaintiff, but the Court will not, in a suit so constituted, decide upon the conflicting interests which his claim embraces, and will decree according to the supposition most favourable to the defendant.—*Blease* v. *Burgh*, B. 221.

6. (*Infant—Statement of debts.*) A bill filed to set aside a voluntary settlement as void against creditors, under the 13th Eliz. c. 5, did not state the particular debts of the settlor, but referred to his schedule in the Insolvent Court, there being an infant interested under the settlement: Held, that the debts were not sufficiently put in issue, and it was referred to the master to inquire into them.—*Townsend* v. *Westacott*, B. 340.

POWER.

1. (*Destruction of.*) An estate was settled to such uses generally as A. and his wife should appoint, and in default of appointment to A. for life, with remainders in strict settlement to the wife for life and the children in tail, remainders to A. in fee. A. became insolvent, and conveyed his estate under the act, and afterwards joined his wife in appointing the estate in fee: Held, agreeably to the certificate of the Court of Exchequer, that the power was not destroyed by the conveyance under the act, and that the appointment operated to convey all the estate not previously vested in the provisional assignee. (Badham v. Mee, 1 Myl. & K. 32; Law Mag. No. , so far as it is at variance with this decision being wrong. See also Hole v. Escott, M. & C. 187; Law Mag. No. 48.)—*Jones* v. *Winwood*, S. 150.

N.B. It is not very clear how the title could be held good according to this decision, as it would appear that a base fee only was appointed, the remainder in fee in the assignee, after failure of A.'s issue, still subsisting.

2. (*Power of sale by implication.*) Where there was a trust which was to determine by conveyance to A. on her marriage, and there was a power of sale given to the trustees during the trust, and A. by her marriage settlement treated the power of sale as still subsisting, and provided for the application of the monies: Held, that the power was continued by implication.—*Wood* v. *White*, M. & C. 460.

And see APPEALS ON REPORTED CASES.

PRACTICE.

1. (*Admission—Costs.*) A defendant having admitted by his answer that all

persons interested were parties to the suit, objected at the hearing for want of parties, and the objection prevailed, but he was made to pay the costs of the day.—*Price* v. *Berrington*, B. 285.

2. (*Affidavit—Time of filing.*) Where a motion to dissolve an injunction is ordered to stand over at the plaintiff's request, affidavits *not* filed till after ten o'clock of the day for which the notice was given, cannot be used at the hearing.—*Anonymous*, S. 50.

5. (*Common injunction.*) The common injunction may be obtained on *any day* on which the Court sits.—*Earl of Chesterfield* v. *Bond*, B. 263.

4. (*Same point.*) Similar decision as in preceding case.—*Reece* v. *Humble*, S. 117.

5. (*Contempt—Plea.*) After attachment for want of answer, it is irregular to file a plea without first tendering the costs of the contempt.—*Foulkes* v. *Jones*, B. 274.

6. (*Costs—Appearance after notice.*) A party who is served with a petition or a notice of motion is entitled to the costs of his appearance, although he is not interested in the matters; and it was so held in the instance of a purchaser, who, on a petition in an administration suit for payment of his purchase money out of Court, appeared after pledging himself not to oppose.—*Bamford* v. *Watts*, B. 201.

7. (*Demurrer—Appeal.*) A party does not lose his right to appeal against the allowance of a demurrer by undertaking to amend.—*Lidbetter* v. *Long*, M. & C. 286.

8. (*Expiration of order—Order on one not a party.*) It is irregular to serve a writ of execution of an order (for payment of money) after the time allowed by the order for such payment, and where the order was made on one not a party, service of the order on him (after expiration of the time allowed), which, in such a case, is substituted for a writ of execution, was held irregular by analogy.—*Duffield* v. *Elwes*, B. 268.

9. (*Information and bill.*) A party who is both relator and plaintiff cannot be heard in person.—*Attorney General* v. *Barker*, M. & C. 262. (And see Attorney General v. The Ironmongers' Company, *supra*, CHARITY, 1.)

10. (*Injunction—Demurrer—Costs.*) An order to amend after demurrer does not prejudice a special injunction, whether or not the order is expressed to be made "without prejudice." The amount of costs in such case depends upon whether the demurrer has been set down for argument or not.—*Warburton* v. *The London and Blackwall Railway Company*, B. 253.

11. (*Master—12th General Order*, 1828—*Acquiescence.*) *Quære* whether the Master can extend the time for making his reports more than once. Where on a reference for exception he had extended it three times, and twelve days after his reporting the answer insufficient, the defendant moved to take the certificate off the file: Held, without deciding the above question, that the defendant, who had not before objected to the extension of time, was barred by acquiescence.—*Davis* v. *Franklin*, B. 369.

12. (*Payment of money out of Court.*) It is contrary to all the principles of the Court to order money in Court to be paid out upon interlocutory application, when at least there is any question whatever about the right to receive it.—*Nedby* v. *Nedby*, M. & C. 367.

13. (*Payment to solicitor.*) Small sums may be paid out of Court to the solicitor of the parties, if the petition on which the order is made is either signed by them or a written authority from them is produced in Court.—*Kelsall* v. *Minton*, B. 361.

14. (*Service of subpœna.*) Service by leaving a *copy* at defendant's residence, sealed up in a letter, at the same time showing the original to defendant's servant, held regular.—*Earl of Chesterfield* v. *Bond*, B. 263.

15. (*Staying proceedings.*) Proceedings in a creditor's suit, in which there were two plaintiffs, stayed as against some of the defendants, on payment of a debt on which alone they were liable, and which was due to one of the plaintiffs. Rule of the Court as to staying proceedings on satisfaction of claim.—*Holden* v. *Kynaston*, B. 204.

16. (*Stop order.*) A party applying for a stop order must give notice to all parties having like orders on the fund.—*Hulkes* v. *Day*, S. 41.

17. (*Supplemental answer.*) A notice of motion for liberty to file a supplemental answer must specify the facts intended to be introduced.—*Haslar* v. *Hollis*, B. 236.

18. (*Supplemental suit.*) A receiver having been appointed in a suit instituted by an annuitant against certain other creditors and trustees, to which suit the first incumbrancer was not a party, the latter filed a bill against the parties to the first suit to establish his priority, and praying, "that if necessary the second bill might be taken as supplemental to the first." He then moved for an injunction to restrain the receiver from making any payment to the parties in the first suit: Held, that such motion was irregular, and that the Court would not then determine whether the second suit was to be taken as supplemental. (Lewis v. Lord Zouche, 1 Jac. & Wal. 647.)—*Smith* v. *Earl of Effingham*, B. 232.

19. (*Taxation.*) An order for taxation obtained as of course, which ought to have been made on special application, discharged.—*Harris* v. *Start*, M. & C. 261.

20. (*Time for election.*) The rule of the Court requiring that the time for filing exceptions to the answer should have elapsed before the defendant can put the plaintiff to his election whether he will proceed at law or in equity, applies to the case of an amended bill as well as that of an original bill, and where the plaintiff had allowed the time for excepting to the first answer to elapse, and then amended his bill, it was held that the defendant could not put him to his election till the time for excepting to the amended answer had gone by.—*Leicester* v. *Leicester*, S. 67.

N.B. Affirmed on appeal by the Lord Chancellor, but the practice was altered by the 1st Order of 9th May, 1839.

And see INFANT; INTERPLEADER; ISSUE, 3; PLEADING, 3.

PRODUCTION OF DOCUMENT.

1. (*Books in use.*) Where a defendant states in his answer, that books which the plaintiff is entitled to see are in constant use and necessary in his business, they will be ordered, in the first instance, to be produced at the defendant's residence or place of business.—*Grane* v. *Cooper*, M. & C. 263.

2. (*Costs.*) Where documents which the defendant is ordered to produce are left for inspection at his solicitor's office, such solicitor is not entitled to make any charge on the plaintiff for inspecting them.—*Woodroffe* v. *Daniel*, S. 126.

And see COSTS.

3. (*Possible right to relief.*) By articles of partnership, the survivor of two partners was to take the whole stock, upon payment to the representatives of the other of what was due to him according to the last half yearly rest. On the death of one, his widow, who was also a legatee, entered into an arrangement with the survivor for a distribution of the partnership effects, which agreement she afterwards filed a bill to set aside, also praying for an account of the partnership dealings since the death of the testator: Held, that she was entitled to production of the partnership accounts since the death, though it was urged that if she succeeded in her bill she would be remitted to the agreement in the articles, which gave no right to an account beyond the death; but the Court thought she might possibly be entitled according to the prayer.—*Hue* v. *Richards*, B. 305.

RECEIVER.

1. (*Absent party.*) Two persons who were seised in equal moieties in fee simple made a mortgage by deposit of deeds. In a suit for foreclosure, one of the two being out of the jurisdiction, but the other being in possession of the whole, a receiver was granted of the whole.—*Holmes* v. *Bell*, B. 298.

2. (*Pending appeal to Privy Council.*) Where there had been a decree of the Ecclesiastical Court respecting probate of a will, against which decree there was an appeal to the Privy Council; the Court appointed a receiver, though it was the suit of one only of the four executors named in the propounded will; and though the conduct of such party had been much questioned, and the bill was improper in some respects as seeking discovery of matters not necessary to make out the case for a receiver.—*Wood* v. *Hitchings*, B. 289. (Affirmed on appeal by Lord Chancellor.)

SALE UNDER DECREE.

1. (*Bidding without leave.*) Though a party in the cause is not entitled to bid without leave, he will not be treated with the same strictness as assignees in bankruptcy attempting to purchase the bankrupt's property; consequently where a party had bid without leave and become a purchaser, a motion that the estate should be put up again at the price for which he bought it, and that if it fetched more the sale should be set aside at the cost of the party who had so purchased, was refused.—*Elworthy* v. *Billing*, S. 98.

2. (*Possession.*) A purchaser under a decree will not be allowed to take possession "without prejudice, &c." even on payment of purchase-money into Court. —*Hutton* v. *Mansell*, B. 260.

SEPARATE USE.

(*Personal chattels.*) The doctrine of separate use applies to personal chattels; and where such were bequeathed, without the intervention of a trustee, to a single woman, it was held that they could not be taken in execution by a creditor of an after-taken husband.—*Newlands* v. *Paynter*, M. & C. 408.

And see APPEALS ON REPORTED CASES, 6.

SHORT CAUSE.

(*Costs.*) Where a motion by plaintiff to have a cause heard as a short cause had been refused on the statement of the defendant's counsel, and the Court afterwards at the hearing thought it might properly have been heard as a short cause, it gave to the plaintiff the costs of the motion which had been reserved.—*Aldworth* v. *Robinson*, B. 287.

SOLICITOR.

(*Taxation—Agent's bill.*) The Court has authority to tax an agent's bill, on the application of the solicitor employing him. (Jones v. Roberts, 8 Sim. 397.)—*Toyhill* v. *Grant*, B. 261.

And see PRACTICE, 7.

SOLICITOR AND CLIENT.

1. (*Authority from client.*) Where a solicitor, having authority from one only of two defendants, put in a joint and several answer for both, the Court refused, on the application of the one who had not given authority, to take the answer off the file in the absence of the other.—*Wiggins* v. *Peppin*, B. 403.

2. (*Retainer—Costs.*) If a solicitor has not a written authority to sue, and the authority is denied, and he cannot prove acquiescence, he will be liable to the costs of the proceedings if unsuccessful.—*S. C.*

3. (*Solicitor's lien.*) A solicitor's lien upon papers in his hands does not entitle him to call upon the Court (as an equitable mortgagee) to realise any security of which the document is in his possession, as a policy; but the bill of the solicitor in this case was dismissed, (reversing the judgment of the Vice Chancellor,) because there was another suit pending in which the policy was before the Court, and in which the solicitor should have applied if at all to enforce his lien. (Case distinguished from Worrall v. Johnson, 2 Jac. & Wal. 211, because in that case the security had been realised.)—*Stedman* v. *Webb*, M. & C. 346.

4. (*Same.*) Where a security is realised in a suit by means of the production of a document, upon which a solicitor, then acting as such, has a lien, his lien upon the fund realised is confined to the costs of that suit; and the case of Worrall v. Johnson, 2 Jac. & Wal. 214, so far as it is contrary to that position, is wrong. It is the same too when the document is voluntarily produced by a solicitor not at the time acting as a solicitor to the party; but in such a case he might if he chose have made his own terms with his former client before producing the deed.—*Bozon* v. *Bolland*, M. & C. 354.

5. (*Taxation of costs—Special directions.*) The Court refused, in the absence of fraud, to insert special directions in an order for taxation, for omitting the costs of certain proceedings improperly taken, because the objection to such items might be taken under the common order in the Master's office.—*Wiggins* v. *Peppin*, B. 403. (Affirmed on appeal.)

SPECIFIC PERFORMANCE.

1. (*Supplemental suit—Damages.*) Held that a party who had obtained a decree for a specific performance might obtain by supplemental suit compensation for damage done to him, by abstraction (by the defendant) *pendente lite* of part of the subject matter of the original suit; the amount of damage to be assessed in an action brought under the direction of the Court.—*Nelson* v. *Bridges*, B. 239.

2. (*Waiver of objection.*) A plaintiff in a suit for specific performance may waive his objections, even after they have been allowed by the Master; and it makes no difference that he should by his bill have prayed for specific performance, only if the plaintiff could make a good title.—*Bennett* v. *Fowler*, B. 302.

TRUST.

1. (*Determination of power.*) Where there was a devise to trustees upon trust to pay the rents to A. for life, and immediately on his decease to convey the land to his children in fee, with a proviso that if any child died under

twenty-one his share should be conveyed to the survivor: it was held, that the trust did not determine at the death of A., leaving infant children, and that a power of sale given to the trustees during the trusts still subsisted.—*Wood* v. *White*, M. & C. 460.

See APPEALS ON REPORTED CASES.

2. (*Words of recommendation.*) Testator gave all his property to his wife and appointed her executrix, adding, "and my reason for doing so is the constant abuse of trustees which I daily witness among men, at the same time trusting she will from the love she bears me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide:" Held, that no trust was created for the children. N.B. The widow had not married again.—*Pope* v. *Pope*, S. 1.

TRUSTEE.

1. (*Allowances to.*) A licensed victualler appointed as his executors the brewer and the spirit merchant with whom he dealt, and directed them to carry on his trade: Held, that they were entitled to charge, at the market price, for the articles which they supplied for that purpose.—*Smith* v. *Langford*, B. 362.

2. (*Discretion.*) A testator excluding his son *John* from all share in his property, gave to his trustees and the survivor of them, and the executors and administrators of such survivor, power to give him an equal share with the other children. One only of the trustees, who were also executors, proved, and an administration suit having been instituted, John was employed under the Court, together with one of his brothers, to carry on the testator's business, and the trustee stated in a statement of facts, that John in that capacity had acted to his satisfaction—and he had also made him advances out of the estate—John died: Held, that his representatives were entitled to a share.—*Eaton* v. *Smith*, B. 236.

VOLUNTARY DEED.

(13 *Eliz. c. 5—Subsequent insolvency.*) A party being largely indebted, makes a voluntary settlement, and afterwards becomes insolvent within three years: the deed was held void under the above statute.—*Townsend* v. *Westacott* B. 340.

WILL.

1. (*Absolute interest—Remoteness.*) Where there was a bequest of personalty, in terms giving an absolute interest in the first instance to the testators, followed by a direction to invest in trust for them for life, with a remainder to their children that was too remote, it was held, that the absolute gift was not cut down by the subsequent direction.—*Ring* v. *Hardwick*, B. 352.

2. (*Construction.*) Testator gave 600*l.* to be applied in payment of the debt to which Z. chapel was or might be subject at his death. At that time, by arrangement among the body of dissenters with which the chapel was in connexion, 600*l.* was laid on the *congregation* belonging to that chapel, but there was no legal charge affecting the chapel; Held, that the legacy failed.—*Davies* v. *Hopkins*, B. 276.

3. (*Construction—Class—Vesting.*) A residue was given to accumulate, and to

be in trust for all the children of J. B. other than A., and to be paid on attaining 23, with a gift over in the event of the death of all the children under 23: Held, that the shares were vested, notwithstanding there was a direction to accumulate till the time of payment, and also, but subject to reconsideration in a different stage of the suit, that a child of J. B. born three years after the death of the testatrix, there being one other child besides A. living at the time of the will, was entitled to share.—*Blease* v. *Burgh*, B. 221.

4. (*Construction—Interest—Share.*) Bequest to trustees to be divided between the testator's wife and six poor members of a chapel: Held, that the wife had a seventh absolutely, and that the interest only of the other six-sevenths was payable to the six poor members *in perpetuum*.—*Gregory* v. *The Attorney-General*, B. 366.

5. (*Construction—Limited reference.*) Testator gave his real and personal property in trust for all his children who might be living at his decease, for their lives; and in case any of the daughters should marry, he gave their shares or share upon certain trusts for their husbands and children after them, and in default of any such child or children, he gave *such shares* equally among his surviving children: Held, that the gift over of the shares applied only to the shares of daughters marrying, and that the share of one who died a spinster was undisposed of after death.—*Lett* v. *Randall*, S. 112.

6. (*Cumulative legacy.*) A testator bequeathed to A. B. an annuity of 150*l.* half-yearly, for her separate use, afterwards, on hearing that she was married, (as she was at the time of the original bequest), he wrote on the margin of the will opposite the above passage, "now Mrs. C. D., one hundred guineas per annum, in quarterly payments," which he signed. The two handwritings were proved separately: Held nevertheless that the annuity of one hundred guineas was in substitution for the other, and that this was given to the separate use. —*Martin* v. *Drinkwater*, B. 215.

7. (*Estate by implication.*) Testator bequeathed one moiety of personal estate to his daughter for life, remainder to her children, and their children by way of substitution, absolutely; the other moiety he gave to his son for life, remainder to his son's children, and if he died without issue living at his death, then to the children of the daughter "in such shares and proportions and in such manner as was directed for the payment and division of their shares in the other moiety," the son died without issue: Held, that the daughter took by implication a life interest in the second moiety.—*Davies* v. *Hopkins*, B. 276.

8. (*Estates for life or in fee.*) Upon a case sent to the Court of Exchequer stating a devise, "of all my houses, lands, and estates in the parish of A., to my cousin I. B., subject to the rent-charge above mentioned, (being an annuity for lives), but at his death the whole shall be for the use of the said I. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives, and if the said children shall die before 21, then he gave the said houses and estates to H. S., for the use and benefit of him and his children," it was returned by the judges in their certificate, contrary to the opinion expressed by the Vice-Chancellor on demurrer, that the children of I. B. took an estate in fee as tenants in common: the facts made it unnecessary to consider the consequences of the death of any children before 21.—*Spry* v. *Bromfield*, S. 4. (See *S. C.* 9 Sim. 534, L. M. No. 51.)

9. (*Estate tail—Children for ever.*) Held, that a devise of copyhold in trust to

pay the rents to A. for life, and after his death to his children, and so on for ever, and for want of such children over, gave an estate in tail to A.—*Trash* v. *Wood*, M. & C. 324.

10. (*Issue—Whether object of power.*) Testator gave rent and personal estate to his wife for life, remainder "to and amongst his three children and their lawful issue, in such proportions, manner, and form, and subject to such charges, &c. as the wife should appoint:" Held, that the issue were not objects of the power, and that the words gave estates tail to the three children in default of appointment. (Case distinguished from Hockly v. Mawbey, 1 Ves. jun. 142.) —*Martin* v. *Swannell*, B. 249.

11. (*Legacy—Period of survivorship.*) Bequest of pecuniary legacy to A. for life, with remainder to B., his wife, for life, remainder to such children of A. as should be living at the death of the survivors of A. and B., to be paid at twenty-one; with survivorship in case of the death of any such children under twenty-one, with a gift over after the death of A. and B. if all such children should die under that age. A. had two children, who both attained twenty-one, but died in his lifetime, leaving issue: Held on the authority of Mackinnon v. Sewell, 2 Myl. & K. 202, that the gift over took effect.—*Wilson* v. *Mount*, B. 397.

12. (*Real estate—Property.*) Testator having given to his eldest son a particular estate, without words of limitation, proceeded to settle the residue of his *property* upon certain trusts between such son and his two sisters and their families, using words in the course of such devise more properly applicable to personal estate, as that his son's share (which in another place was called a *portion*) was to be *placed* in the names of trustees, and that in certain cases some of the *capital* might be advanced—the son's interest too in the residue was only for life: Held, nevertheless, that the reversion in fee of the particular estate passed by the residuary clause.—*Saumarez* v. *Saumarez*, M. & C. 331.

13. (*Remoteness.*) A devise in these words, "to all and every my grandchildren, the children of my said son A., and three daughters, B., C., and D., who shall attain the age of twenty-four years:" Held void, for remoteness, although there were no grandchildren, not born in the testator's life-time.—*Newman* v. *Newman*, S. 51.

14. (*Specific legacy—Word "his."*) Testatator bequeathed as many of *his* canal shares as he should leave children him surviving, one share for each child, "at the date of his will, he had eight shares and seven children; at his death, ten shares and eleven children:" Held, that the eight shares only passed.—*Miller* v. *Little*, B. 259.

15. (*Substitution of issue.*) A fund was bequeathed in trust for the children of I. B., to be divided equally among them and the issue of such of them as shall be dead, such issue to take per stirpes: Held, that the issue of a child of I. B., who was dead at the date of the will, were entitled.—*Bebb* v. *Beckwith*, B. 308.

16. (*Vesting of Legacies—Time of payment.*) Where there was first a distinct gift of a legacy, and then a direction that it should be paid *within* six months, and a general declaration that all legacies should be vested only when payable, and the legatee died within the six months: Held, that the legacy had vested.—*Lucas* v. *Carline*, B. 367.

And see APPEALS ON REPORTED CASES, 5.

APPEALS ON REPORTED CASES.

1. Bacon v. Spottiswoode, 1 Bea. 282; Law Mag. No. 47, PATENT (*Injunction at the hearing*).—A judgment affirmed, M. & C. 433.
2. Ball v. Harris, 8 Sim. 485; Law Mag. No. 45, CHARGE ON DEBTS (*Power to mortgage*).—Judgment affirmed, M. & C. 264.
3. Bent v. Bennett, 7 Sim. 539; Law Mag. No. 39, FRAUD (*Patient and medical adviser*).—Affirmed, M. & C. 269.
4. Eland v. Eland, 1 Bea. 235; Law Mag. No. 47, ADMINISTRATION OF ASSETS; VENDOR AND PURCHASER (*Notice of charge*).—Affirmed, with costs, M. & C. 420.
5. Pickering v. Pickering, 2 Bea. 31; Law Mag. No. 51, WILL (*Life interest in leaseholds*).—Affirmed, with costs, M. & C. 289.
6. Tullett v. Armstrong, 1 Bea. 1; (also Scarborough v. Borman, 1 Bea. 34;) Law Mag. No. 46, SEPARATE USE (*Future Coverture—Anticipation clause*).—Affirmed, without costs, M. & C. 377—407, whereby it is established that the trust for the separate use, and the clause against anticipation, will take effect on a future marriage.

ORDER OF COURT.

Saturday, April 3d, 1841.

IT IS ORDERED:—That in all cases where any stocks or funds are or shall be standing in the name of the Accountant-General of the Court, to the general credit of any cause, or to the account of any class or classes of persons, and an order shall be made to prevent the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of any person or persons entitled in expectancy or otherwise to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the share of such stocks or funds affected by such order, shall, at the discretion of the Court, be liable to pay any costs, charges, and expences which, by reason of such order having been obtained, shall be occasioned to any party to the cause or any person interested in any such stocks or funds. And henceforward any person presenting a petition for any such order as aforesaid shall not be required to serve such petition upon the parties to the cause or upon the persons interested in parts of the stocks or funds not sought to be affected by any such order.

And it is ordered, That this order be entered with the Registrars of the Court, and copies thereof set up in the offices of the Registrars and Six Clerks.

(Signed.) COTTENHAM, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.

BANKRUPTCY.

[Containing Montagu, Deacon, and De Gex, Vol. 1, Parts 1, 2.]

ACT OF BANKRUPTCY.

1. (*Composition—Assent.*) Where the petitioning creditor had authorized an attorney to attend on his behalf a meeting of creditors called by bankrupt, saying, " I will leave my interest in your hands," and in pursuance of the resolutions passed at the meeting, which were communicated to the creditor, a deed was prepared and executed by bankrupt and many of the creditors, but not by this creditor, and a dividend was declared by the trustees, of which he was informed and did not object: Held, that he could not set up the composition deed as an act of bankruptcy.—*Exp. and re Tealdi*, 210.

2. (*Evidence—Admission.*) An admission of bankrupt, made after he had been denied to a creditor, but on the same day, that he had given orders for that purpose, as he knew the creditor wanted money: Held, on a petition by him to annul, to be evidence against him at any rate on the fact of his having given orders to be denied, though not of the intention.—*Exp. and re Prescott*, 199.

ANNULLING.

(*Evidence—Proceedings.*) On a petition by bankrupt to annul, the depositions on the proceedings are not evidence against him. In this case the petition stood over to give time to the petitioning creditor to answer the affidavits filed by bankrupt.—*S. C.*

APPARENT OWNERSHIP.

(*Trade fixtures.*) Machinery used in trade, which was fixed to the walls and floor and could not be removed without injury to the property, there being a custom also in that part of the country to demise such fixtures: Held, not in the apparent ownership.—*Exp. Scarth*, 240.

ARBITRATION.

(*Award binding on assignees.*) Although an agreement of the bankrupt to refer to arbitration is not binding on his assignees, yet where a judge's order made by *consent* in a cause in which the bankrupt was plaintiff recognised a pending arbitration, and ordered that if any sum was found due from the bankrupt the defendant might set it off; this was held binding on the assignees, and the sum not having been ascertained before the bankruptcy the question of amount was referred to the registrar, and the assignees in the mean time restrained from proceeding.—*Exp. Milne*, 181.

ASSIGNEES.

1. (*Carrying on bankrupt's trade.*) A majority of creditors, though at a meeting

duly convened, cannot, where others dissent, authorize the assignees to carry on the bankrupt's trade or induce the Court to allow of their so doing; and per Sir G. Rose, one dissentient creditor is enough.—*Exp. Miller*, 39.

2. (*New choice.*) Where the creditors choose three assignees and the commissioners reject one, there must be a new choice.—*Exp. Wilson*, 234.

3. (*Removal.*) The commissioners may direct the removal of a bankrupt assignee and a new choice, without reference to the Court of Review.—*Exp. Bonsor*, 194.

4. (*Removal for fraud—Costs.*) An assignee who was removed for conniving at a gross fraud upon the bankrupt's estate, ordered to pay the costs of his removal, and of the new choice, and of the application.—*Exp. Perryer*, 276.

5. (*Set-off.*) One or two assignees not allowed to set off a debt due to himself against a dividend payable to a creditor, although he swore that the creditor had agreed to allow such set-off.—*Exp. Bailey*, 263.

BANKER.

(*Deposit of bills.*) A party deposited with his banker India bills, (i. e. bills drawn on the East India Company by order of the Governor and Council of Bombay,) and specially indorsed them, in order to their being presented by the banker when due: Held, in the absence of any evidence of any understanding that they were to be considered as cash, and there having been a continuing balance in favour of the depositor exclusive of these bills, that the banker had no right to pay them over, and that, having done so, the assignees must repay the whole amount to the depositor. N. B. A distinction is suggested by Sir J. Cross between these and common bills of exchange.—*Exp. Bond*, 10.

BANKRUPT.

1. (*Action against—Partner—Indemnity.*) Where one of two joint partners became a bankrupt, and a joint creditor, who had proved his debt under the fiat, (and received a dividend) brought an action against the solvent partner, in which he joined the bankrupt for conformity: Held, that the latter was entitled to an indemnity against the action.—*Exp. and re Stanton*, 273.

2. (*Misdescription—Waiver.*) Held, that a bankrupt, who was described as John G., his real name being John *Christian* G., but who had been examined before the commissioner without stating the objection, could not afterwards urge it to upset the fiat.—*Exp. and re Gilligan*, 144.

And see PRACTICE, 7.

BILL OF EXCHANGE. See BANKER.

COMPOSITION.

(*Part payment of composition—Statute of Limitations.*) Where the bankrupt had entered into a composition which he only imperfectly fulfilled, and made a payment to the creditor, accompanied by a letter promising to pay the balance generally and enclosing a receipt describing the payment "as on account of a composition upon the balance of account owing," which receipt the creditor declined signing: Held, that the creditor was by default of the debtor remitted to his right under the original debt, and that there was an acknowledgment and promise sufficient to exclude the operation of the statute of limitations.—*Exp. Batson*, 289.

And see ACT OF BANKRUPTCY, 1.

CONSTRUCTION.

(*Memorandum of deposit.*) Where on the deposit of a deed, by one part of which a house was conveyed to the bankrupt, and by another part, and for a distinct consideration, the furniture was assigned, the memorandum of deposit spoke of the deeds deposited (being the lease and release) "as the title deeds of my Bognor *estate*:" Held, that the house only was charged.—*Exp. Hunt*, 139.

And see DEED.

COSTS. See ASSIGNEE; PETITIONING CREDITOR; SAVINGS BANK.

DEED.

(*Construction—Limited recital.*) Held, that the recital of an agreement to mortgage "a *freehold* estate at A. subject to the charge affecting the same," did not restrict the operative part of a deed, which in its terms included other freehold estate not subject to any charge and also copyhold, there being also other memoranda showing an intention to give a general charge.—*Exp. Glyn*, 29.

EQUITABLE MORTGAGE.

1. (*Interest pending appeal.*) Pending an appeal to the Lord Chancellor by an equitable mortgagee, it was agreed between him and the assignees that the property should be sold and the proceeds invested: Held, that he was entitled to the interest which had accrued upon the purchase money, but not entitled to interest on his debt subsequent to the date of the fiat, up to which time it had been allowed by the commissioner, Sir J. Cross entertaining a doubt as to whether even that allowance was proper, the debt not carrying interest.—*Exp. Pollard*, 264.

2. (*Memorandum of deposit.*) Where the only memorandum was an order for delivery of the deeds, without specifying the purpose of the deposit, the creditor is only entitled to the usual order as upon a bare deposit, that is, the order is to be at his own expence.—*Exp. Smith*, 165.

3. (*Presumptive frauds.*) Where the deposit had been made with a creditor only seven days before striking the docket, and there was nothing to show that it was not made in contemplation of bankruptcy, and no pressure upon the bankrupt, the petition to establish the charge was dismissed with costs.—*Exp. Morgan*, 116.

And see CONSTRUCTION; PRINCIPAL AND SURETY; PROOF, 4.

FIXTURES. See APPARENT OWNERSHIP.

ISSUE. See PRACTICE, 14.

JOINT STOCK BANK.

(*Liability of individual members.*) A creditor of a joint stock banking company, formed under 7 Geo. 4, c. 46, may sue out a fiat against any individual member of the company, without proceeding in the first instance against the public officer of the company.—*Exp. and re Wood*, 92.

JOINT STOCK COMPANY.

(*What amounts to trading.*) Holding shares in a joint stock company for ten days only, during which no dividend or profit was received by the holder, did not, in the opinion of the Court, constitute a trading, but the case was not decided upon that point.—*Exp. and re Atkinson*, 300.

MISTAKE. See PRACTICE.

OFFICIAL ASSIGNEE.

Quære, whether in the case of a very old commission, under which the assignees were dead, and their solicitor also, and it appeared there was no further estate to be got in, the official assignee sufficiently represents the estate.—*Exp. Monck*, 152.

ORDER.

(*Form of—Recital.*) *Quære* whether it is necessary that an order of the Court of Review, if required to be produced in an action at law (as in this case an order for substituting a new petitioning creditor was produced in an action of trover by the assignees,) should contain a particular recital of the proceedings upon which it was made, (as in this case, was it necessary that it should state the substituted debt to have been proved before the petition for substituting it had been presented). See form of amended order at length.—*Exp. Hall*, 217.

PARTNERSHIP.

1. (*Bill of exchange.*) An acceptance, given by one partner for a debt of his own in the name of the firm, without the authority of the other partner, held not sufficient as a debt to support a joint fiat against the two partners.—*Exp. Austen*, 247.

2. (*Co-contractor.*) The rule that a joint creditor cannot prove against the estate of one of several joint debtors while any remain solvent, applies only to the case of partners, and not to that of co-contractors.—*Exp. Buckingham*, 235.

3. (*Joint and separate estate.*) A house, of which part was used as an office for the purposes of the business (no rent being charged to the partnership for it,) but of which the rents and profits were always carried to the separate account of one partner (who was the father of the other), and it was always treated between the two as his separate property, held to belong to his separate estate. *Exp. Murton*, 252.

PETITIONING CREDITOR.

1. (*Change of fiat—Costs.*) Where separate fiats had first been issued, and then annulled to make way for a joint one, the Court refused to make the petitioning creditor pay the costs of the separate fiats, because the bankrupt was not properly described in them, the misdescription not being thought to vitiate them.—*Exp. Burdikin*, 156.

2. (*Same.*) Where the bankrupts, on the eve of forming a partnership, and for the purpose of purchasing a business, had given a bill, which they signed separately, and the partnership had lasted but a very short time, and the petitioning creditor first took out separate fiats, and having begun to work them abandoned them for a joint fiat, and obtained an order, throwing upon the joint estate the expenses of the separate fiats, the Court refused to discharge such order, in consideration of the doubt and difficulty in which the creditor had found himself.—*Exp. Duncan*, 149.

3. (*Estoppel.*) Where the petitioning creditor had been an assenting party to a composition, though he had not executed the deed, the Court would not proceed with the fiat till he had given an indemnity to the assignees.—*Exp. Fernandes*, 114.

4. (*Misdescription.*) Where the affidavits in support of the debt stated it to be

due to two partners, and it was in reality due to these, the fact was immaterial. *Exp. and re James*, 2.

And see PARTNERSHIP.

PLEADING.

(*Prayer—General relief.*) The rule is, that relief may be given under the general prayer, if a proper case is made by the bill, different from the specific relief prayed for, but not inconsistent with it. Accordingly, where the bill prayed that the defendant might refund certain dividends, and he demurred for misreceiving others, till the other creditors had received as much as he had by means of a security, and the bill also stated that he was subsequently, by virtue of the adjudication of a foreign court, to receive payment on account of certain debts due to the testator, and it was held that he was entitled under the circumstances to receive the amount which was due to him by right of proof. It was also determined, that under the prayer for general relief, the plaintiffs might obtain an injunction to restrain such subsequent further payments, if at the hearing he should prove his claims.—*Cockerell v. Barnes* 2.

PRACTICE.

1. *Affidavit of service.* [illegible]

2. *Affidavit—* [illegible]

3. *Examination of witness.* [illegible]

4. *Examination.* [illegible]

5. *Examination.* [illegible]

6. *Examination.* [illegible]

7. *Examination.* [illegible]

8. [illegible]

9. (*Conveyance by bankrupt.*) The order for the bankrupt to join in the conveyance of his estate, under 6 Geo. 4, c. 16, s. 78, is of course, unless he disputes the validity of the fiat.—*Exp. Bradstock*, 118.

10. (*Correction of error.*) A mistake in the affidavit in support of the debt, which was stated to be due to petitioning creditor instead of to him and his partner, corrected at the opening of the fiat.—*Re Linthorp*, 164.

11. (*Direction of fiat.*) The Court refused to change it from Devonport to London, merely because the greater proportion of creditors and debtors were to be found in the latter place, the affidavit not stating that there was any of the estate of the bankrupt there.

The Court expressed great unwillingness to entertain such applications.—*Re Blake*, 262.

12. (*Same.*) Where out of the five nearest Commissioners three had an interest adverse to the bankrupt, and one other was not likely to act, the fiat was directed to the next nearest place.—*Exp. and re Jones*, 145.

13. (*Equitable mortgagee—Parties.*) An equitable mortgagee applying for the common order, must bring before the Court all the parties holding as a deposit deeds relating to the same property.—*Exp. Burt*, 191.

14. (*Issue.*) Where two issues are directed as to distinct facts in the same bankruptcy, *semble* that they may be tried at once and upon one record.—*Exp. Fisher*, 209.

15. (*Joint for separate fiat.*) The order to annul a separate fiat in favour of a joint one is of course.—*Exp. Pemberton*, 190.

16. (*Misspelling.*) *Westcott* for *Wescott* held not a material variance of the bankrupt's name.—*Exp. Austin*, 247.

17. (*Objection for want of signature.*) Such an objection to a petition will not be entertained, except upon affidavit of the fact of want of signature, or after notice to produce.—*Exp. Young*, 117.

18. (*Retaxation of solicitor's bill.*) A petition by creditor simply to retax a solicitor's bill need not be served upon the assignees, unless they have paid the bill; accordingly, where the petition was served upon one of the solicitors, who were also solicitors to the assignees, and he appeared on such service, his appearance was taken to be on behalf of the solicitors.—*Exp. Ainsworth*, 226.

19. (*Standing over.*) The Court will not allow a petition to stand over for the alleged purpose of answering affidavits, unless upon hearing the affidavits read it thinks they require an answer.—*Exp. Fernandes*, 114.

20. (*Staying proceedings.*) The Court will not stay the advertisement after the adjudication, unless upon inspection of the proceedings, and some defect appearing upon the face of them.—*Exp. and re Wood*, 92.

21. (*Stop-order.*) The presenting of a petition to annul, by bankrupt, is not of itself ground for an order to stop the sale of his estate; the Court must look at the proceedings.—*Re Atkinson*, 238.

22. (*Supersedeas—Fees.*) Where all the creditors consent, and *no estate* has been got in, the bankrupt is entitled to his supersedeas, though the fees of 10*l.* and 20*l.*, which by the 1 & 2 Will. 4, c. 56, ss. 46 and 55, are directed to be paid *out of the estate*, have not been paid.—*Exp. and re Green*, 175.

23. (*Supplemental petition.*) Such a petition held not necessary by reason only that the assignees were chosen after presentation of the original petition.—*Exp. Austen*, 247.

And see ORDER.

PRINCIPAL AND SURETY.

(*Equitable mortgagee.*) The bankrupt had deposited deeds with A., as an indemnity to A. for guaranteeing payment of a debt from the bankrupt to B.; B. having proved the debt: Held, that A. was not entitled to enforce his right as equitable mortgagee until that proof was expunged.—*Exp. Sherrington*, 195.

And see EQUITABLE MORTGAGE; PROOF, 6.

PRIVILEGE.

(*Husband of party.*) The husband of a petitioner, who attended his wife at the hearing of the petition, held privileged from arrest *eundo et redeundo*.—*Exp. Britton*, 278.

PROOF.

1. (*Damages—Deficiency on resale—Special custom.*) Where it was the custom of a trade, the tea trade, that where the purchaser paid part only of his purchase money at the time of the contract, the vendor should retain the goods till a fixed day, and upon the remainder of the price not being paid, might resell and charge the purchaser for deficiency, together with interest from such fixed day, and also for warehouse room, &c. and the bankrupt having entered into such contract became bankrupt before the day fixed, and the assignees refused to take the goods: Held, that the vendor, who had resold at a loss, might prove for the deficiency, &c.—*Exp. Moffatt*, 282.

2. (*Double proof on bills of exchange.*) A bonâ fide holder of bills of exchange, for payment of which the bankrupt had also given a security, transfers the security to a third party, who proves thereon: Held, that the holder of the bills might also prove upon them, reserving the question as to whether he should receive any dividend.—*Exp. re Barham*, 179.

3. (*Foreign security.*) The reason for which a creditor who has realized a security is excluded from proof is, that he has already taken part of the fund which would otherwise have been available for payment of the debts, and this reason therefore does not apply to the case of a security attaching to property not in the power of the assignees, as an estate in a foreign country. (Selkrig v. Davis, 2 Rose, 318.)—*Cockerell* v. *Dickens*, 45, (in the Privy Council.)

4. (*Joint and several security.*) Two partners transferred to a creditor of the firm a mortgage made to them as partners, and by the deed jointly and severally covenanted for payment of the debt. It was the opinion of Sir J. Cross, opposed to that of Sir G. Rose, that the creditor was entitled to prove for his whole debt against the separate estates without first realizing his security.—*Exp. Shepherd*, 101.

5. (*Joint and separate debt—Conversion.*) Where the debt was originally a joint debt from A. and B., and upon B.'s bankruptcy and proof against his estate A. who retains the partnership assets, undertook to pay the debt by instalments; and afterwards deposited as a security the deeds of an estate belonging to himself: Held, upon his bankruptcy, that there was no sufficient evidence of a conversion of the joint debt into a separate one.—*Exp. Smith*, 165.

6. (*Principal and surety—Bill of exchange.*) Where bills of exchange accepted

by bankrupt were deposited with petitioner as a security for a debt due to him by the drawer of the bills, who on depositing them indorsed them to petitioner; he was allowed to prove for the whole amount due on the bills, but not to receive more than his debt.—*Exp. Phillips*, 232.

7. (*Principal and surety—Security.*) One of two bankrupts under a joint fiat, being also partners in a firm which was not bankrupt, gave to petitioners, who were creditors of both firms, a security for any monies that might become due from either firm: Held, that the proceeds of such security might be applied in payment of debt due from the bankrupts, leaving the right to prove on the whole debt.—*Exp. Glyn*, 25.

And see EQUITABLE MORTGAGE; PRINCIPAL AND SURETY.

REPUTED OWNERSHIP.

(*Fixtures.*) *Quære* whether the ordinary tenant's fixtures in a dwelling-house are goods and chattels within the meaning of the 6 Geo. 4, c. 16, s. 72. It was held by Sir J. Cross that they were not; but a contrary opinion, though subject to a consideration of the particular nature of the fixtures, was intimated by Sir G. Rose, and in order to facilitate an appeal, the decision was that they were not. (See Boydell v. Mac Michael, 3 Tyr. 974; Law Mag. No. ; Wilson's case, 4 Dea. & Chitty, 143; Law Mag. No. 29.)—*Exp. King*, 119.

SAVINGS BANKS.

(*Priority—Costs of mistaken application.*) Where the treasurer of a savings bank is one of two bankrupts under a joint fiat, the priority given to the trustees (under 3 & 4 Will. 4, c. 14, s. 25,) is confined to the separate estate, and where the trustees by their petition sought to charge also the joint estate, and could not show that it was necessary to apply to the Court to enforce their claim upon the separate estate, they were refused their costs of the order against the separate estate.—*Exp. Appach*, 83.

STATUTE OF LIMITATIONS. See COMPOSITION.

SUPERSEDEAS.

(*Lost proceedings—Certificate.*) Where the proceedings under a commission issued in 1804 had been lost, and the Commissioner in consequence declined giving the certificate of consent, the Court with some hesitation refused the order to supersede, though it intimated that the evidence then before the Court of all creditors consenting was sufficient.—*Exp. Monck*, 192.

TRADING.

1. (*Employment of traders.*) A party taking unfinished houses on which he had a mortgage (or purchasing them in that state) and then employing a builder to complete them, in order that he may dispose of them, does not by so doing become a trader within the meaning of the bankrupt acts.—*Exp. and re Edwards*, 3.

2. (*Evidence—Proper test.*) The bankrupt was shewn on three several occasions to have bought a yacht and sold it again. He also said he thought it no disgrace thus to increase his income—but it was not shewn that he did so *to gain his livelihood*; which according to Sir G. Rose is the true test of trading.—*Exp. Cromwell*, 158.—*Quære*, was this a trading?

3. (*Joint stock bank.*) The question whether a shareholder in a joint stock banking company is a trader depends upon the intention with which he took the

shares. If for the purpose of obtaining the benefit of the bankrupt laws it is not sufficient, but if bonâ fide and for the sake of profit it is so. Holding fifty shares for two years and receiving dividends upon them was considered a trading.—*Exp. Wyndham*, 146.

4. (*Salt works.*) Held, that the taking a lease of salt works and brine pits for the purpose of making and selling salt, which was made chiefly from the springs and rock salt on the premises demised, but some of the brine was obtained by channels from the adjoining land, was not a trading under 6 Geo. 4, c. 16, s. 2.—*Exp. Atkinson*, 300.

HOUSE OF LORDS.

[Containing 5 Clark & Finnelly, Part 4.]

EVIDENCE.

1. (*Certificate of Heralds' College.*) Certificates produced from the Heralds' College, purporting to be contemporaneous funeral certificates taken by the officers of arms, and by the orders of the earl marshal, though not signed, yet shown to be contemporaneous by a book of partition of fees, containing entries of the officers who attended on particular occasions, and signed by such officers, as admitting the receipt of fees on each occasion, admitted as evidence.—*Vaux Peerage*, 541.

2. (*Competency of testator—letters.*) Letters written to a testator were tendered in evidence as proofs of his competency, and their admissibility urged on three grounds, 1st, that they were declarations accompanying certain acts of the *writers*; 2nd, that they were evidences of the manner in which they treated the testator; 3rd, that they accompanied and explained certain acts done by the testator; and with reference to this latter ground, the evidence was that the letters were found open in a closet or repository in the house of the testator, and one of them appeared to have been acted on to this extent, that whereas it suggested a reference to the solicitor of the testator, it had been indorsed by such solicitor as having come to his hands: Held, after taking the opinion of the judges, that neither ground of admissibility was made out, because as to the *first*, the acts of the writers, i. e. the writing of the letters (which they accompanied), were in themselves immaterial (and therefore not admissible), except in virtue of the declarations contained in the letters themselves; as to the *second* ground, that they were *at most* but an expression of the opinions of the writers, and not in the nature of acts prompted and influenced by an immediate intercourse with the testator; and as to the *third* ground, that the evidence did not show that

they were necessarily opened and laid by, or, as in the letter shown to the solicitor, acted on by the testator himself, and not by any other person.—*Wright* v. *Tatham*, 670.

3. (*Document—Custody.*) A document purporting to be a statement of the family of the alleged ancestor of claimant, produced from the custody of a stranger in blood, but who was descended from the wife of such alleged ancestor, held not evidence of the state of the family.—*Vaux Peerage*, 535.

4. (*Peerage—Statements of chroniclers.*) Statements of chroniclers, Stowe and Dugdale, with a contemporaneous manuscript preserved in the Heralds' College, held not evidence of the mode of creation of a peerage.—*S. C.* 538.

5. (*Records of House of Lords.*) The minutes of the committee of privilege case, in another peerage case, stating a monumental inscription to have been either admitted or proved, are not evidence of such inscription.—*S. C.* 541.

JURISDICTION.

1. (*Court of error—Bill of exceptions.*) Quære whether the ruling of the judge at nisi prius, as to admisibility of evidence, in a case where the question turns upon the assumption of certain facts, one way or the other, can properly be discussed in error, and whether not, only upon motion for new trial in the Court from which the writ proceeded.—*Wright* v. *Tatham*, 670.

2. (*Lis pendens.*) Quære, how far is a lis pendens in England notice of an equity affecting lands in Ireland.—*Houlditch* v. *Wallace*, 629.

3. (*Receiver.*) As to the mode of giving effect over Irish estates to the appointment of a receiver in a suit in England, and generally to the proceedings in that suit. —*S. C.*

PEERAGE.

(*Presumption—Negative evidence of summons.*) Where it was shown that the ancestor of the claimant had first sat in parliament on the 25th Hen. 8, it did not appear by what right, and again on the 28th Hen. 8; on which latter occasion his name appeared among the list of the lords summoned; and upon a *diligent* search no patent could be discovered, though the patent rolls were complete, it was held that such ancestor must be presumed to have been called by writ, and there being only one instance in this country of a writ with a limitation of the grant (i. e. in Bromflete's case), that such writ must be taken to have created a peerage in fee descendible to females.—*Vaux Peerage*, 526.

TRUST DEED.)

(*Lien—Purchaser for valuable consideration—Laches.*) In 1799, Lord Donegal being tenant for life of estates in Ireland, conveyed them to trustees for ninety-nine years, upon trust to pay him an annuity of 10,000*l.* a year, and to accumulate and apply the surplus in payment of his debts. In 1802, a creditor filed a bill in England against the trustees and Lord Donegal, to carry the trusts of that deed into execution, and a decree was made against the trustees for an account, and a receiver appointed, but Lord Donegal, who was out of the jurisdiction, in Ireland, continued nevertheless in possession of the rents. In 1807 he came to England, and a supplemental bill was filed against him; upon which an injunction was granted against him, restraining him from receiving the rents, and afterwards the decree in the original cause pronounced as against him, and the injunction and receiver continued by the decree. But no proceedings were taken to give effect to this decree in Ireland, and nothing done to enforce

the claim of the creditor till the year 1836. In the meanwhile Lord Donegal continued in possession until 1819, when he agreed to grant, and shortly afterwards did grant for valuable consideration, certain annuities chargeable upon his annuity of 10,000*l.* In 1828 the creditors claiming under the original deed filed a bill *in Ireland* to obtain the benefit of the decree made in the English suit; and in 1835, after much litigation, and an appeal to the House of Lords, obtained a decree for payment, and for an account of the rents and profits, upon the footing of the original decree. Very shortly after such decree of 1835, the assignees of the derivative annuities filed a bill in Ireland to enforce their claim under the derivative annuities granted in 1819, to which bill they made the plaintiffs in the other suits defendants, who by their answer claimed a lien upon the 10,000*l.* to make good the surplus of the rents and charges which Lord Donegal had received in contravention of the trust deed of 1799, and they filed a supplemental bill to establish that claim: Held, on appeal, affirming the judgment of the Court below, that such creditors had forfeited by their laches whatever equity they had to have the 10,000*l.* applied in making good the surplus rents and profits received by Lord Donegal; which equity, it was observed by the Court, would not, apart the laches, have extended later than 1819, so as to prejudice the rights of those who then became purchasers of the original annuity, to the extent of their derivative annuities.—*Houlditch* v. *Wallace*, 629.

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EVENTS OF THE QUARTER.

The County Court Bill has thrown a numerous body of the profession into alarm, and we have accordingly devoted a part of the present number to an exposure of its defects. The alarm, however, is clearly premature. The Bill has little chance of passing, and rumour says that it was brought in by Mr. Fox Maule without consulting the law-officers, who consequently can hardly be expected to be very zealous in its support. Another rumour is that, if it reaches the Upper House, it will be opposed by Lord Brougham, the great advocate of former measures of this sort.

The Bill for facilitating the Administration of Justice in Equity has been introduced into the House of Commons by the Attorney-General, and bids fair to pass, unless any fresh impediment should arise from the internal embarrassments of the Government. It was dropped last year because they could not make a satisfactory division of the patronage. Many of the most experienced Chancery reformers think that the measure will do little more than bring to light the defects of other parts of the system—the Masters' and other offices, for example. An able pamphlet, entitled "Letters to a Chancery Reformer," was recently published by Mr. Merivale, in which this view is forcibly advocated.

Sir Edward Sugden has brought in a Bill to improve the Supreme Courts of Appeal, but there is little chance of any material change being effected in these for some time to come. The House of Lords are naturally unwilling to part with any portion of their privileges, and we fear that the imperfections of the Judicial Committee are not yet sufficiently well known to be forced by the press or the public on the attention of the legislature.

The Common Pleas are taking things very coolly, and will doubtless continue so to do unless some parliamentary notice be taken of them. Hopes were held out, when the Court was closed, that counsel not of the coif would at all events be admitted to make motions for new trials, but the monopoly is preserved entire under the pretence of preventing confusion, whilst serjeants are to be found arguing indiscriminately any questions that may be entrusted to them in any other Court during the sitting of their own. This is utterly unworthy of a body with such high prescriptive claims to respectability.

Great inconvenience is constantly arising from the imperfections of judges' notes, and in more than one instance, we regret to say, these have given birth to suspicions not very honourable to the Bench. The establishment of official shorthand writers is the obvious remedy—their zeal and accuracy to be quickened and insured by giving them the privilege of selling copies of their notes to the parties or other persons demanding them.

Early in February last, Sir Joseph Littledale retired from the Bench amidst the regrets and sympathies of the profession, most gracefully expressed by the Attorney-General in a short valedictory address delivered in the name of the bar. He was succeeded, as had been anticipated, by Mr. (now Mr. Justice) Wightman, who is generally admitted to combine a more than common share of the qualities most needed in a judge—clearness of understanding, sound sense, extensive acquirements, patience, and courtesy.

It is understood that the Northern Circuit will be divided, but no plan has been definitively fixed.

LIST OF NEW PUBLICATIONS.

A Treatise on the Law relating to Composition with Creditors. With an Appendix, containing Precedents of Pleadings and Deeds. By William Forsyth, of the Inner Temple, Esq., M.A., Barrister at Law. 12mo. Price 6*s*. boards.

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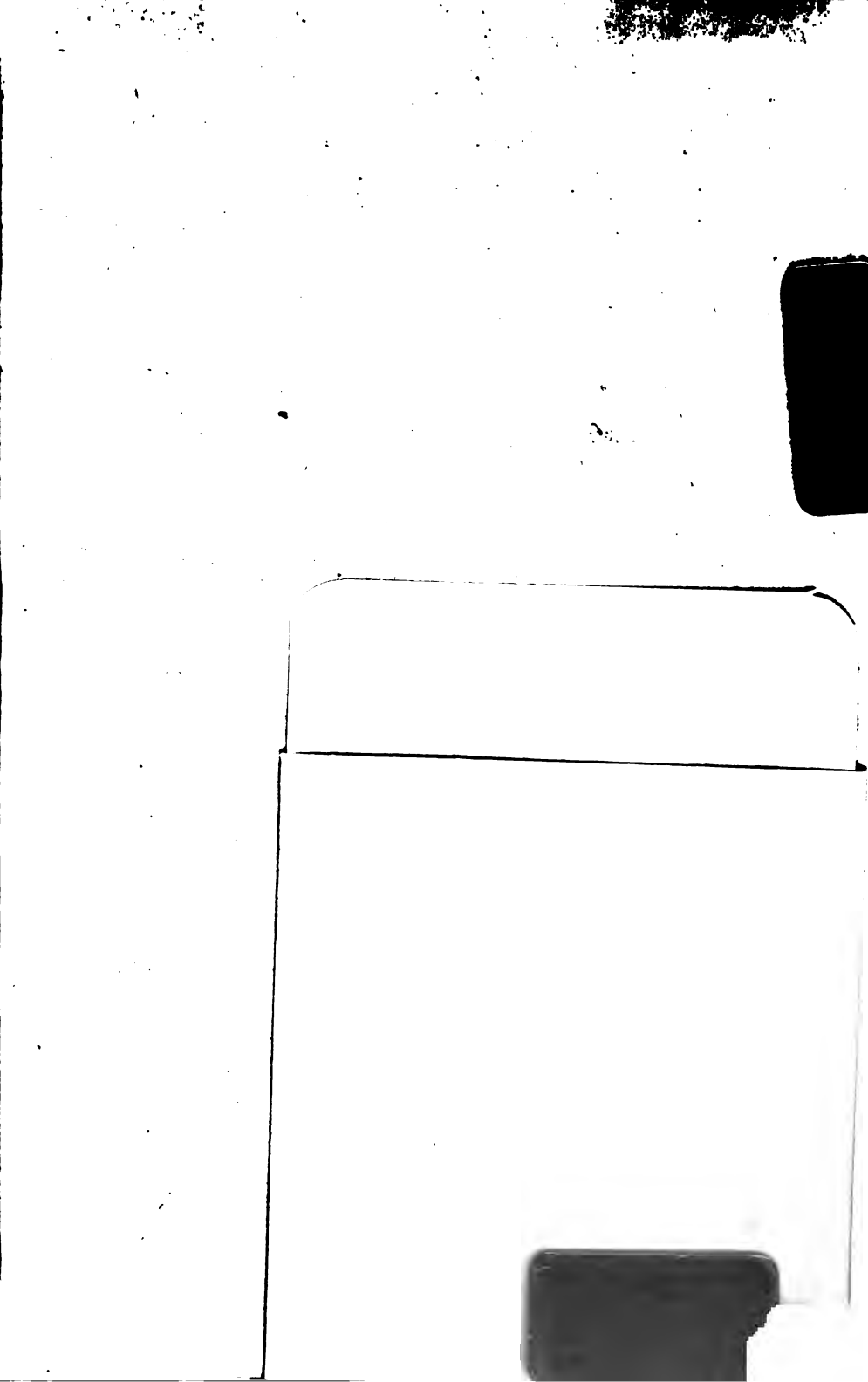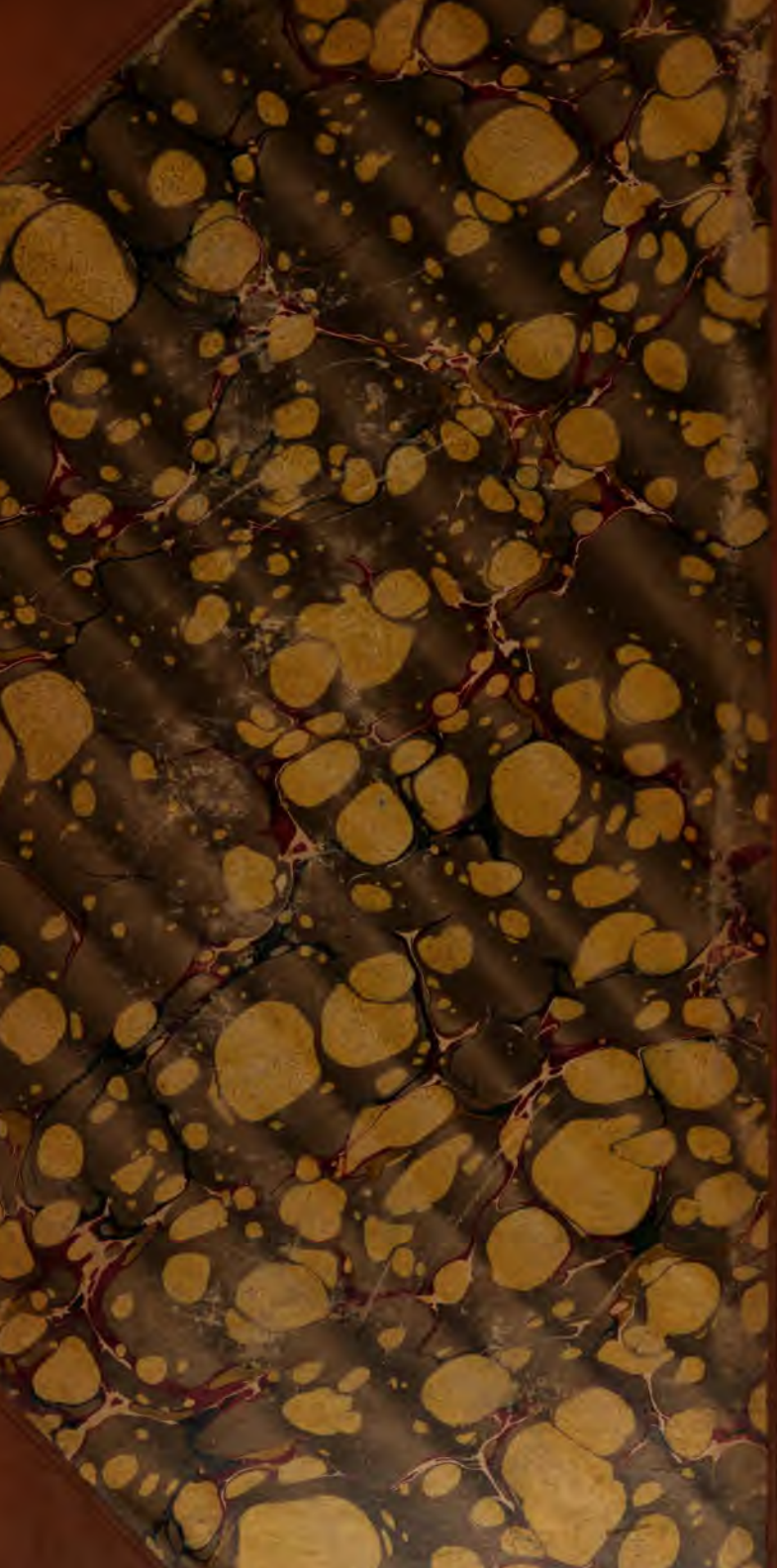
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